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COPYRIGHT HEARINGS, DECEMBER 7 TO 11, 1906.

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## ARGUMENTS

BEFORE THE

# COMMITTEES ON PATENTS

OF THE

SENATE AND HOUSE OF REPRESENTATIVES, CONJOINTLY,

ON THE BILLS

S. 6330 AND H. R. 19853.

TO AMEND AND CONSOLIDATE THE ACTS  
RESPECTING COPYRIGHT.

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DECEMBER 7, 8, 10, AND 11, 1906.

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WASHINGTON:  
GOVERNMENT PRINTING OFFICE.  
1906.

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FIFTY-NINTH CONGRESS,

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WILLIAM W. CAMPBELL, OHIO. EDWIN Y. WEBB, NORTH CAROLINA.  
ANDREW J. BARCHFELD, PENNSYLVANIA. ROBERT G. SOUTHALL, VIRGINIA.  
JOHN GILL, JR., MARYLAND.  
EDWARD A. BARNEY, *Clerk*.

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# TABLE OF CONTENTS.

	Page.
Text of copyright bill (S. 6330; H. R. 19853) .....	5
List of all persons present at hearings.....	21
HEARING, Friday morning, December 7, 1906:	
Statement of Herbert Putnam, Librarian of Congress .....	25
Statements by—	
F. W. Hedgeland .....	26
Herbert Putnam, Librarian of Congress.....	31
Charles S. Burton .....	34
George W. Ogilvie.....	38
George Haven Putnam, secretary American Publishers' Copyright League .....	49
Arthur E. Bostwick .....	58
Statement of the delegates of the American Library Association .....	59
Bernard C. Steiner .....	61
Library Copyright League: Arguments .....	65
H. C. Wellman.....	68
William P. Cutter .....	73
HEARING, Friday afternoon, December 7, 1906:	
Statements by—	
R. R. Bowker, vice-president American (Authors') Copyright League.....	77
Memorandum on the bill to secure intellectual property .....	81
Robert Underwood Johnson, secretary American (Authors') Copyright League .....	88
English copyright act of August 4, 1906.....	92
Thomas Nelson Page.....	96
Frank D. Millet .....	97
W. A. Livingstone, president Print Publishers' Association of America.....	98
Memorandum of the Print Publishers of America .....	103
Letters by W. A. Livingstone.....	110
H. N. Low .....	113
Rev. Edward Everett Hale.....	114
Samuel L. Clemens .....	116
HEARING, Saturday morning, December 8, 1906:	
Statements by—	
C. P. Montgomery, customs division, Treasury Department .....	121
John McDougald, commissioner of customs, Canada .....	124
Charles Porterfield .....	126
William M. McKinney .....	138
Ansley Wilcox .....	141
Alfred Lucking.....	148
David C. Harrington .....	151
International Correspondence Schools, Scranton, December 8, 1906 .....	152
Arthur Steuart, chairman, copyright committee American Bar Association.....	154
Letters from—	
Geo. P. Tilton.....	168
American Newspaper Publishers' Association.....	169
Publishers' Association of New York City.....	169
Fromme Brothers, New York .....	170
The Inland Printer, August, 1906.....	172
HEARING, Saturday afternoon, December 8, 1906:	
Statements by—	
Arthur Steuart, continued .....	173
Jeremiah J. Sullivan.....	184
George Haven Putnam, secretary American Publishers' Copyright League .....	188
Memoranda on sections 9, 13, and 30 of the bill .....	194
Draft of amendment by Ansley Wilcox .....	196
Reginald De Koven.....	197
Nathan Burkan .....	201
J. L. Tindale.....	227

<b>HEARING, Monday morning, December 10, 1906:</b>	<b>Page.</b>
<b>Statements by—</b>	
J. F. Bowers, president Music Publishers' Association of the United States .....	234
B. F. Wood .....	236
George W. Furniss .....	238
Copyright from Publishers' standpoint, from Music Trades, December 1, 1906 .....	242
R. R. Bowker, vice-president American (Authors') Copyright League .....	247
Robert Underwood Johnson, secretary American (Authors') Copyright League .....	251
Charles S. Burton .....	252
Robert Glockling .....	261
<b>HEARING, Monday afternoon, December 10, 1906:</b>	
<b>Statements by—</b>	
Charles S. Burton, continued .....	263
G. Howlett Davis, letters .....	268
Memorandum of objections to the bill by Philip Mauro .....	376
Albert H. Walker .....	270
Frank L. Dyer .....	286
George W. Pound .....	298
<b>HEARING, Monday evening, December 10, 1906:</b>	
<b>Statements by—</b>	
George W. Pound, continued .....	306
Paul Cromelin .....	321
Article on the copyright bill in The Musical Age .....	346
Editorial in The Musical Age, June 30, 1906 .....	351
John J. O'Connell .....	352
<b>Letter from—</b>	
Hon. Frederick I. Allen, Commissioner of Patents .....	369
<b>HEARING, Tuesday morning, December 11, 1906:</b>	
<b>Statements by—</b>	
Arthur W. Tams .....	371
Eugene De Kleist .....	382
<b>Amendment offered by—</b>	
Burkan, Nathan .....	389
Montgomery, Charles P .....	392
<b>Letters from—</b>	
Associated Advertising Clubs of America .....	386
Babcock, William H .....	387
Britton and Gray .....	388
Falk, B. J .....	388
MacDonald, Pirie .....	388
Burkan, N .....	389
Burton, Hon. T. E .....	389
Kehr, Cyrus .....	390
Montgomery, Charles P .....	391
Sargent, S. Harold .....	392
Underwood and Underwood .....	393
<b>Resolutions of—</b>	
Associated Advertising Clubs of America .....	387
<b>Telegram from—</b>	
Leeds and Catlin Company .....	391
<b>Statement by—</b>	
Herbert Putnam, Librarian of Congress .....	395
<b>APPENDIX:</b>	
Statement of the general term of copyright in various countries .....	401
Amendments approved by American (Authors') Copyright League .....	402
Memorandum of the committee on copyright and trade-mark of the Association of the Bar of the City of New York .....	403
Substitute draft prepared by Mr. C. S. Burton from his former draft (M. Clark Piano Company) and the draft of Mr. Charles Porterfield, and sundry suggestions of Mr. George W. Pound, Mr. J. J. O'Connell, and others, at the December hearings .....	411
Substitute draft prepared by Mr. Charles Porterfield .....	427
<b>INDEX .....</b>	<b>435</b>



[Fifty-ninth Congress, first session.]

A BILL To amend and consolidate the acts respecting copyright.

(S. 6330; H. R. 19853.)

CONTENTS.

Secs.

- 1- 3. Nature of copyright.
- 4- 7. Subject-matter of copyright.
- 8. Who may obtain copyright.
- 9-17. How to secure copyright.
- 18-20. Duration of copyright.

Secs.

- 21-36. Protection of copyright.
- 37-45. Transfer of copyright.
- 46-60. Copyright Office.
- 61-64. Miscellaneous provisions.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the copyright secured by this act shall include the sole and exclusive right:

(a) For the purposes set forth in subsection (b) hereof, to make any copy of any work or part thereof the subject of copyright under the provisions of this act, or to abridge, adapt, or translate into another language or dialect any such work, or make any other version thereof;

(b) To sell, distribute, exhibit, or let for hire, or offer or keep for sale, distribution, exhibition, or hire, any copy of such work;

(c) To deliver, or authorize the delivery of, in public for profit, any copyrighted lecture, sermon, address, or similar production prepared for oral delivery;

(d) To publicly perform or represent a copyrighted dramatic work, or to convert it into a novel or other nondramatic work;

(e) To dramatize any copyrighted nondramatic work and produce the same either by publication or performance;

(f) To publicly perform a copyrighted musical work, or any part thereof, or for purpose of public performance or the purposes set forth in subsection (b) hereof to make any arrangement or setting of such work, or of the melody thereof, in any system of notation;

(g) To make, sell, distribute, or let for hire any device, contrivance, or appliance especially adapted in any manner whatsoever to reproduce to the ear the whole or any material part of any work published and copyrighted after this act shall have gone into effect, or by means of any such device or appliance publicly to reproduce to the ear the whole or any material part of such work.

(h) To produce any abridgment, variation, adaptation, or arrangement of a copyrighted work of art.

SEC. 2. That nothing in this act shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, or to obtain damages therefor.

SEC. 3. That the copyright provided by this act shall extend to and protect all the copyrightable component parts of the work copyrighted, any and all reproductions or copies thereof, in whatever

form, style, or size, and all matter reproduced therein in which copyright is already subsisting, but without extending the duration of such copyright.

SEC. 4. That the works for which copyright may be secured under this act shall include all the works of an author.

SEC. 5. That the application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

(a) Books, including composite and cyclopædic works, directories, gazetteers, and other compilations, and new matter contained in new editions; but not including works specified in other subsections hereunder.

(b) Periodicals, including newspapers.

(c) Oral lectures, sermons, addresses.

(d) Dramatic compositions.

(e) Musical compositions.

(f) Maps.

(g) Works of art, models or designs for works of art.

(h) Reproductions of a work of art.

(i) Drawings or plastic works of a scientific or technical character.

(j) Photographs.

(k) Prints and pictorial illustrations.

(l) Labels and prints relating to articles of manufacture, as heretofore registered in the Patent Office under the act of June eighteenth, eighteen hundred and seventy-four: *Provided, nevertheless,* That the above specifications shall not be held to limit the subject-matter of copyright as defined in section four of this act, nor shall any error in classification invalidate or impair the copyright protection secured under this act.

SEC. 6. That additions to copyrighted works and alterations, revisions, abridgments, dramatizations, translations, compilations, arrangements, or other versions of works, whether copyrighted or in the public domain, shall be regarded as new works subject to copyright under the provisions of this act; but no such copyright shall affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to grant an exclusive right to such use of the original works.

SEC. 7. That no copyright shall subsist—

(a) In any publication of the United States Government or any reprint, in whole or in part, thereof: *Provided, however,* That the publication or republication by the Government, either separately or in a public document, of any material in which copyright is subsisting shall not be taken to cause any abridgment or annulment of the copyright or to authorize any use or appropriation of such copyright material without the consent of the copyright proprietor;

(b) In the original text of a work by any author not a citizen of the United States first published without the limits of the United States prior to July first, eighteen hundred and ninety-one; or in the original text of any work which has fallen into the public domain.

SEC. 8. That the author or proprietor of any work made the subject of copyright by this act, or his executors, administrators, or assigns, shall have copyright for such work under the conditions and for the terms specified in this act: *Provided, however,* That the copyright

secured by this act shall extend to the work of an author or proprietor who is a citizen or subject of a foreign state or nation, only when such foreign author or proprietor—

(a) Shall be living within the United States at the time of the making and first publication of his work, or shall first or contemporaneously publish his work within the limits of the United States; or

(b) When the foreign state or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection substantially equal to the protection secured to such foreign author under this act; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may at its pleasure become a party thereto.

The existence of the reciprocal conditions aforesaid shall be determined by the President of the United States, by proclamation made from time to time, as the purposes of this act may require.

SEC. 9. That any person entitled thereto by this act may secure copyright for his work by publication thereof with the notice of copyright required by this act; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor. In the case of a work of art or a plastic work or drawing, such notice shall be affixed to the original also before publication thereof. In the case of a lecture or similar work intended only for oral delivery, notice of copyright shall be given at each public delivery thereof.

SEC. 10. That such person may obtain registration of his claim to copyright by complying with the requirements prescribed in this act; and such registration shall be prima facie evidence of ownership.

Registration may also be had of works, of which copies are not reproduced for sale, by the deposit, with claim of copyright, of the title and one complete printed or manuscript copy of such work, if it be a lecture or similar production or a dramatic or musical composition; of a photographic print, if the work be a photograph, or of a photograph or other identifying reproduction thereof, if it be a work of art, or a plastic work or drawing; the notice of copyright in these latter cases being affixed to the original before publication as required by section nine above. But the privilege of registration secured hereunder shall not exempt the copyright proprietor from the requirement of deposit of copies under section eleven herein where the work is later reproduced in copies for sale.

SEC. 11. That not later than thirty days (but in the case of a periodical not later than ten days) after the publication of the work upon which copyright is claimed, there shall be deposited in the Copyright Office, or in the United States mail addressed to the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition; or if the work be a label or print relating to an article of manufacture, one such copy; or if a contribution to a periodical for which contribution special registration is requested, one copy of the issue or issues of the periodical containing such contribution, to be deposited not later than ten days after publication; or if the work is not reproduced in copies for sale, there shall be deposited the copy, print, photograph, or other identifying

reproduction required by section ten above; such copies or copy, print, photograph, or other reproduction to be accompanied in each case by a claim of copyright.

SEC. 12. That the postmaster to whom are delivered the articles required to be deposited under section eleven above shall, if requested, give a receipt therefor, and shall mail them to their destination without cost to the copyright claimant.

SEC. 13. That of a printed book or periodical the text of the copies deposited under section eleven above shall be printed from type set within the limits of the United States, either by hand or by the aid of any kind of typesetting machine, or from plates made from type set within the limits of the United States, or if the text be produced by lithographic process, then by a process wholly performed within the limits of the United States; which requirements shall extend also to the illustrations produced by lithographic process within a printed book consisting of text and illustrations, and also to separate lithographs, except where in either case the subjects represented are located in a foreign country; but they shall not apply to works in raised characters for the use of the blind, and they shall be subject to the provisions of section sixteen with reference to books published abroad seeking ad interim protection under this act.

In the case of the book the copies so deposited shall be accompanied by an affidavit, under the official seal of any officer authorized to administer oaths within the United States, duly made by the person claiming copyright or by his duly authorized agent or representative residing in the United States or by the printer who has printed the book, setting forth that the copies deposited have been printed from type set within the limits of the United States or from plates made from type set within the limits of the United States, or, if the text be produced by lithographic process, that such process was wholly performed within the limits of the United States.

Any person who for the purpose of obtaining a copyright shall knowingly be guilty of making a false affidavit as to his having complied with the above conditions shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars, and all of his rights and privileges under said copyright shall thereafter be forfeited.

Such affidavit shall state also the place within the United States and the establishment in which such type was set or plates were made or lithographic process was performed and the date of the completion of the printing of the book or the date of publication.

SEC. 14. That the notice of copyright required by section nine shall consist either of the word "Copyright," or the abbreviation "Copr.," or, in the case of any of the works specified in subsections (f) to (l), inclusive, of section five of this act, the letter C inclosed within a circle, thus: ©, accompanied in every case by the name of the author or copyright proprietor as registered in the Copyright Office; or, in the case of works specified in subsections (f) to (l), inclusive, of section five of this act, by his initials, monogram, mark, or symbol, provided that on some accessible portion of the work or of the margin, back, permanent base or pedestal thereof, or of the substance on which the work shall be mounted his name shall

appear. But in the case of works in which copyright is subsisting when this act shall go into effect, the notice of copyright may be either in one of the forms prescribed herein or in one of those prescribed by the act of June eighteenth, eighteen hundred and seventy-four.

The notice of copyright shall be applied, in the case of a book or other printed publication, upon its title-page or the page immediately following, or, if a periodical, either upon the title-page or upon the first page of text of each separate number or under the title heading; or if a work specified in subsections (f) to (l), inclusive, of section five of this act, upon some accessible portion of the work itself or of the margin, back, permanent base or pedestal thereof, or of the substance on which the work shall be mounted.

In a composite work one notice of copyright shall suffice.

Upon every copy of a published musical composition in which the right of public performance is reserved there shall be imprinted under the notice of copyright the words "Right of public performance reserved;" in default of which no action shall be maintained nor recovery be had for any such performance, although without the consent of the copyright proprietor.

SEC. 15. That if, by reason of any error or omission, the requirements prescribed above in section eleven have not been complied with within the time therein specified, or if failure to make registration has occurred by the error or omission of any administrative officer or employee of the United States, it shall be permissible for the author or proprietor to make the required deposit and secure the necessary registration within a period of one year after the first publication of the work: *Provided*, That in such case no action shall be brought for infringement of the copyright until such requirements have been fully complied with: *And provided further*, That the privilege above afforded of completing the registration and deposit after the expiration of the period prescribed in section eleven shall not exempt the proprietor of any article which bears a notice of copyright from depositing the required copy or copies upon specific written demand therefor by the Register of Copyrights, who may make such demand at any time subsequent to the expiration of such period; and after the said demand shall have been made, in default of the deposit of the copies of the work within one month from any part of the United States except an outlying territorial possession of the United States, or within three months from any outlying territorial possession of the United States or from any foreign country, the proprietor of the copyright shall be liable to a fine of one hundred dollars.

Where the copyright proprietor has sought to comply with the requirements of this act as to notice and the notice has been duly affixed to the bulk of the edition published, its omission by inadvertence from a particular copy or copies, though preventing recourse against an innocent infringer without notice, shall not invalidate the copyright nor prevent recovery for infringement against any person who after actual notification of the copyright begins an undertaking to infringe it.

SEC. 16. That in the case of a book published in a foreign country before publication in this country the deposit in the Copyright Office not later than thirty days after its publication abroad of one com-

plete copy of the foreign edition with a request for the reservation of the copyright, and a statement of the name and nationality of the author and of the copyright proprietor, and of the date of publication of the said book shall secure to the author or proprietor an ad interim copyright. Except as otherwise provided, the ad interim copyright thus secured shall have all the force and effect given to copyright by this act, and shall endure as follows:

(a) In the case of a book printed abroad in a foreign language, for a period of two years after the first publication of the book in the foreign country.

(b) In the case of a book printed abroad in the English language or in English and one or more foreign languages, for a period of thirty days after such deposit in the Copyright Office.

SEC. 17. That whenever within the period of such ad interim protection an authorized edition shall be produced and published from type set within the limits of the United States or from plates made therefrom, (a) of a book in the English language or (b) of a book in a foreign language, either in the original language or in an English translation thereof, and whenever the requirements prescribed by this act as to deposit of copies, registration, filing of affidavit, and the printing of the copyright notice shall have been duly complied with, the copyright shall be extended to endure in such original book for the full terms elsewhere provided in this act.

SEC. 18. That the copyright secured by this act shall endure—

(a) For twenty-eight years after the date of first publication in the case of any print or label relating to articles of manufacture: *Provided*, That the copyright which at the time of the passing of this act may be subsisting in any article named in this section shall endure for the balance of the term of copyright fixed by the laws then in force.

(b) For fifty years after the date of first publication in the case of any composite or collective work; any work copyrighted by a corporate body or by the employer of the author or authors; any abridgment, compilation, dramatization, or translation; any posthumous work; any arrangement or reproduction in some new form of a musical composition; any photograph; any reproduction of a work of art; any print or pictorial illustration; the copyrightable contents of any newspaper or other periodical; and the additions or annotations to works previously published.

(c) For the lifetime of the author and for fifty years after his death, in the case of his original book, lecture, dramatic or musical composition, map, work of art, drawing or plastic work of a scientific or technical character, or other original work, but not including any work specified in subsections (a) or (b) hereof; and in the case of joint authors, during their joint lives and for fifty years after the death of the last survivor of them.

In all of the above cases the term shall extend to the end of the calendar year of expiration.

The copyright in a work published anonymously or under an assumed name shall subsist for the same period as if the work had been produced bearing the author's true name.

SEC. 19. That the copyright subsisting in any work at the time when this act goes into effect may, at the expiration of the renewal

term provided for under existing law, be further renewed and extended by the author, if he be still living, or if he be dead, leaving a widow, by his widow, or in her default or if no widow survive him, by his children, if any survive him, for a further period such that the entire term shall be equal to that secured by this act: *Provided*, That application for such renewal and extension shall be made to the Copyright Office and duly registered therein within one year prior to the expiration of the existing term: *And provided further*, That should such subsisting copyright have been assigned, or a license granted therein for publication upon payment of royalty, the copyright shall be renewed and extended only in case the assignee or licensee shall join in the application for such renewal and extension.

SEC. 20. That the author's exclusive right to dramatize or translate any one of his works in which copyright is subsisting shall, after the expiration of ten years from the day on which the work was registered in the Copyright Office, continue effective only in case a dramatization or translation thereof has been produced within that period by his consent or that of his assigns, and in the case of translations shall be confined to the language of any translation so produced.

SEC. 21. That every person who, without the consent of the author or proprietor first obtained, shall publish or reproduce in any manner whatsoever any unpublished copyrightable work shall be liable to the author or proprietor for all damages occasioned by such injury, and to an injunction restraining such unauthorized publication, as hereinafter provided.

SEC. 22. That any reproduction, without the consent of the author or copyright proprietor, of any work or any material part of any work in which copyright is subsisting shall be illegal and is hereby prohibited. The provisions of section thirty-eight hundred and ninety-three of the Revised Statutes prohibiting the use of the mails in certain cases, and also the provision of section thirty-eight hundred and ninety-five of the Revised Statutes shall apply, and the importation into the United States of any such fraudulent copies or reproductions is hereby prohibited.

SEC. 23. That if any person shall infringe the copyright in any work protected under the copyright laws of the United States by doing or causing to be done, without the consent of the copyright proprietor first obtained in writing, any act the exclusive right to do or authorize which is by such laws reserved to such proprietor, such person shall be liable:

- (a) To an injunction restraining such infringement;
- (b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer may have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only, and defendant shall be required to prove every element of cost which he claims; or in lieu of actual damages and profits, such damages as to the court shall appear just, to be assessed upon the following basis, but such damages shall in no case exceed the sum of five thousand dollars nor be less than the sum of two hundred and fifty dollars, and shall not be regarded as a penalty:

First. In the case of a painting, statue, or sculpture, or any device



especially adapted to reproduce to the ear any copyrighted work, not less than ten dollars for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees.

Second. In the case of a lecture, sermon, or address, not less than fifty dollars for every infringing delivery.

Third. In the case of a dramatic or musical composition, not less than one hundred dollars for the first and not less than fifty dollars for every subsequent infringing performance.

Fourth. In the case of all other works enumerated in section five of this act, not less than one dollar for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees.

(c) To deliver up on oath to be impounded during the pendency of the action, upon such terms and conditions as the court may prescribe, all goods alleged to infringe a copyright.

(d) To deliver up on oath for destruction all the infringing copies or devices, as well as all plates, molds, matrices, or other means for making such infringing copies.

Any court given jurisdiction under section thirty-two of this act may proceed in any action instituted for violation of any provision hereof to enter a judgment or decree enforcing any of the remedies herein provided.

SEC. 24. That the proceedings for an injunction, damages and profits, and those for the seizure of infringing copies, plates, molds, matrices, and so forth, aforementioned, may be united in one action.

SEC. 25. That any person who willfully and for profit shall infringe any copyright secured by this act, or who shall knowingly and willfully aid or abet such infringement or in anywise knowingly and willfully take part in any such infringement, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment for not exceeding one year or by a fine of not less than one hundred dollars nor more than one thousand dollars, or both, in the discretion of the court.

Any person who, with fraudulent intent, shall insert or impress any notice of copyright required by this act, or words of the same purport, in or upon any article for which he has not obtained copyright, or with fraudulent intent shall remove or alter the copyright notice upon an article duly copyrighted, shall be guilty of a misdemeanor, punishable by a fine of not less than one hundred dollars and not more than one thousand dollars. Any person who shall knowingly issue or sell any article bearing a notice of United States copyright which has not been copyrighted in this country, or who shall knowingly import any article bearing such notice, or words of the same purport, which has not been copyrighted in this country, shall be liable to a fine of one hundred dollars.

The importation into the United States of any article bearing such notice of copyright when there is no existing copyright thereon in the United States is prohibited, and such importations shall be proceeded against as provided by sections twenty-six to twenty-nine, inclusive, of this act.

SEC. 26. That any and all such fraudulent copies prohibited importation by this act which are brought into the United States from any foreign country shall be seized by the collector, surveyor, or other officer of the customs, or any person authorized in writing to

make seizures under the customs revenue laws, in the district in which they are found; and the copies so seized shall without delay be delivered into the custody of the principal customs officer of the collection district in which the seizure is made; whereupon the said officer shall (except in cases of importation by mail) publish a notice of such seizure once a week for three successive weeks in some newspaper of the county or place where such seizure shall have been made. If no newspaper is published in such county, then such notice shall be published in some newspaper of the county in which the principal customs office of the district is situated; and if no newspaper is published in such county, then notices shall be posted in proper public places, which notices shall describe the articles seized and state the time, cause, and place of seizure, and shall require any person claiming such articles to appear and file with such customs officer his claim to such articles within twenty days from the date of the first publication of such notice.

SEC. 27. That any person claiming the property so seized may, at any time within twenty days from the date of such first publication of notice, file with the collector or other proper officer, a claim stating his interest in the articles seized, and deposit with such collector or other proper officer a bond to the United States, as now prescribed by law, in the penal sum of two hundred and fifty dollars, with two sureties, to be approved by said collector or other proper officer, conditioned that in case of the condemnation of the articles so claimed the obligors shall pay all the costs and expenses of the proceedings to obtain such condemnation.

Such collector, or other proper officer, shall transmit the said bond with a duplicate list and description of the articles seized and claimed to the United States attorney for the proper district, who shall proceed for a condemnation of the property by information, as in customs-revenue cases.

SEC. 28. That in case the property shall be condemned it shall be delivered into the custody of the United States marshal and destroyed in such manner as the court may direct. If not condemned, the said articles shall be delivered to the importer on payment of the duty, if any be due. If probable cause is found by the court as an existing fact connected with the seizure, the officer or other person making the seizure shall be entitled to a certificate affording him an absolute defense to any action on account of the seizure. If no such claim shall be filed or bond given within the twenty days above specified, the collector or other proper officer of the customs who has custody of the property shall declare the same forfeited, and it shall be destroyed in such manner as shall be prescribed by the Secretary of the Treasury.

SEC. 29. That mails from foreign countries shall be carefully examined by postmasters, who shall forward to the principal customs officer of the district in which the post-office is situated any foreign mail package supposed to contain any article imported in violation of the provisions of this act. Upon receipt of such package the customs officer shall detain the same in his custody and notify by mail the addressee of the package of its detention, and require him to show cause within thirty days why the supposed prohibited articles should not be destroyed. If the person so addressed shall not appear and show cause to the contrary, the customs officer shall make formal

seizure of the articles contained in the package supposed to be prohibited importation, and if the package contains any prohibited articles shall declare the same forfeited, whereupon said articles shall be destroyed in such manner as the Secretary of the Treasury shall direct. If upon examination the articles prove to be innocent of any violation of law the package shall be forwarded to the addressee in regular course of mail, subject to the payment of customs duty, if any be due. If the addressee appears and shows to the satisfaction of the said officer that the importation of the articles is not prohibited, the said articles shall be delivered to the addressee upon payment of the customs duty, if any be due.

SEC. 30. That during the existence of the American copyright in any book the importation into the United States of any foreign edition or editions thereof (although authorized by the author or proprietor) not printed from type set within the limits of the United States or from plates made therefrom, or any plates of the same not made from type set within the limits of the United States, or any editions thereof produced by lithographic process not performed within the limits of the United States, in accordance with the requirements of section thirteen of this Act, shall be, and is hereby, prohibited: *Provided, however,* That such prohibition shall not apply—

(a) To works in raised characters for the use of the blind;

(b) To a foreign newspaper or magazine, although containing matter copyrighted in the United States printed or reprinted by authority of the copyright proprietor, unless such newspaper or magazine contains also copyright matter printed or reprinted without such authorization;

(c) To the authorized edition of a book in a foreign language or languages, of which only a translation into English has been copyrighted in this country;

(d) To books in a foreign language or languages, published without the limits of the United States, but deposited and registered for an ad interim copyright under the provisions of this act; in which case the importation of copies of an authorized foreign edition shall be permitted during the ad interim term of two years, or until such time within this period as an edition shall have been produced from type set within the limits of the United States, or from plates made therefrom, or by a lithographic process performed therein as above provided;

(e) To any book published abroad with the authorization of the author or copyright proprietor when imported under the circumstances stated in one of the four subdivisions following, that is to say:

First. When imported, not more than one copy at one time, for use and not for sale, under permission given by the proprietor of the American copyright;

Second. When imported, not more than one copy at one time, by the authority or for the use of the United States;

Third. When specially imported, for use and not for sale, not more than one copy of any such book in any one invoice, in good faith, by or for any society or institution incorporated for educational, literary, philosophical, scientific, or religious purposes, or for the encouragement of the fine arts, or for any college, academy, school, or seminary of learning, or for any State school, college, university, or

free public library in the United States; but such privilege of importation without the consent of the American copyright proprietor shall not extend to a foreign reprint of a book by an American author copyrighted in the United States unless copies of the American edition can not be supplied by the American publisher or copyright proprietor;

Fourth. When such books form parts of libraries or collections purchased en bloc for the use of societies, institutions, or libraries, designated in the foregoing paragraph, or form parts of the libraries or personal baggage belonging to persons or families arriving from foreign countries, and are not intended for sale: *Provided*, That copies imported as above may not lawfully be used in any way to violate the rights of the American copyright proprietor or annul or limit the copyright protection secured by this act, and such unlawful use shall be deemed an infringement of copyright.

SEC. 31. That all copies of authorized editions of copyright books imported in violation of the above provisions of this act may be exported and returned to the country of export, provided it be shown to the satisfaction of the Secretary of the Treasury upon written application that such importation does not involve willful negligence or fraud. If absence of willful negligence or fraud be not established to the satisfaction of the Secretary of the Treasury, the importation shall be proceeded against as in the case of fraudulent copies in the manner prescribed by sections twenty-six to twenty-nine, inclusive, of this act.

SEC. 32. That all actions arising under the copyright laws of the United States shall be originally cognizable by the circuit courts of the United States, the district court of any Territory, the supreme court of the District of Columbia, the district courts of Alaska, Hawaii, and Porto Rico, and the courts of first instance of the Philippine Islands.

Actions arising under this act may be instituted in the district of which the defendant is an inhabitant, or in the district where the violation of any provision of this act has occurred.

Any such court, or judge thereof, shall have power, upon bill in equity filed by any party aggrieved, to grant an injunction to prevent the violation of any right secured by said laws, according to the course and principles of courts of equity, on such terms as said court or judge may deem reasonable. Any injunction that may be granted restraining and enjoining the doing of anything forbidden by this act may be served on the parties against whom such injunction may be granted anywhere in the United States, and shall be operative throughout the United States and be enforceable by proceedings in contempt, or otherwise, by any other court or judge possessing jurisdiction of the defendants; but the defendants, or any or either of them, may make a motion in the proper court of any other district where such a violation is alleged to dissolve said injunction upon such reasonable notice to the plaintiff as the court or judge before whom said motion shall be made shall deem proper, service of said motion to be made on the plaintiff in person or on his attorney in the action. Said courts or judges shall have authority to enforce said injunction and to hear and determine a motion to dissolve the same, as herein provided, as fully as if the action were pending or brought in the district in which said motion is made.

The clerk of the court, or judge granting the injunction, shall, when required so to do by the court hearing the application to dissolve or enforce said injunction, transmit without delay to said court a certified copy of all the papers on which the said injunction was granted that are on file in his office.

When any action is brought in any place whereof the defendant is not an inhabitant, service of process shall be made by the marshal of the district of which the defendant is an inhabitant, or of the district where he may be found, upon receiving a certified copy of the process from the clerk of the court where the suit was brought, and return shall be made by said marshal to said court.

SEC. 33. That the final orders, judgments, or decrees of any court mentioned in section thirty-two of this act arising under the copyright laws of the United States may be reviewed on appeal or writ of error in the manner and to the extent now provided by law for the review of cases finally determined in said courts respectively.

SEC. 34. That no action shall be maintained under the provisions of this act unless the same is commenced within three years after the cause of action arose.

SEC. 35. That in all recoveries under this act full costs shall be allowed.

SEC. 36. That nothing in this act shall prevent, lessen, impeach, or avoid any remedy at law or in equity which any party aggrieved by any infringement of a copyright might have had if this act had not been passed.

SEC. 37. That the copyright is distinct from the property in the material object which is the subject of copyright, and the sale or conveyance, by gift or otherwise, of the original object shall not of itself imply the cession of the copyright, nor shall the assignment of the copyright imply the transfer of the material object.

SEC. 38. That the right of translation, the right of dramatization, the right of oral delivery of a lecture, the right of representation in the case of a dramatic composition, the right of performance in the case of a musical composition, where the latter is reserved, as provided in section fourteen hereof, the right to make any mechanical device by which music may be reproduced to the ear, and the right of reproduction of a work of art or of a drawing or plastic work of a scientific or technical character shall each be deemed a separate estate subject to assignment, lease, license, gift, bequest, or inheritance.

SEC. 39. That the copyright in a work of art and the ownership of the work shall be deemed to be distinct properties, and, except as provided for in this act, the copyright in any artistic work shall remain in the author of the work, even if such work be sold or disposed of by such author, unless the copyright therein be expressly assigned or disposed of in writing by him or pass by operation of law or testamentary disposition.

SEC. 40. That every assignment of copyright under this act shall be by an instrument of writing signed by the assignor.

SEC. 41. That every assignment of copyright executed in a foreign country shall be acknowledged by the assignor before a consular officer or secretary of legation of the United States authorized by law to administer oaths or perform notarial acts. The certificate of such acknowledgment under the hand and official seal of such consular

officer or secretary of legation shall be prima facie evidence of the execution of the instrument.

SEC. 42. That every assignment of copyright shall be recorded in the Copyright Office within ninety days after its execution in the United States or within six calendar months after its execution without the limits of the United States, in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, whose assignment has been duly recorded.

SEC. 43. That in place of the original instrument of assignment there may be sent for record a true copy of the same duly certified as such by any official authorized to take an acknowledgment to a deed.

SEC. 44. That the Register of Copyrights shall, upon payment of the prescribed fee, record such assignment, and shall return to the sender, with a certificate of record attached, under seal, the original instrument or the copy of the same so filed for record; and upon the payment of the fee prescribed by this act he shall furnish to any person requesting the same a certified copy thereof, under the seal of the Copyright Office.

SEC. 45. That when an assignment of the copyright in a specified book or other work has been recorded the assignee shall have the privilege of substituting his name for that of the assignor in the statutory notice of copyright prescribed by this act.

SEC. 46. That all records and other things relating to copyrights required by law to be preserved shall be kept and preserved in the Copyright Office, Library of Congress, District of Columbia, and shall be under the control of the Register of Copyrights, who shall, under the direction and supervision of the Librarian of Congress, perform all the duties relating to the registration of copyrights.

SEC. 47. That there shall be appointed by the Librarian of Congress a Register of Copyrights, at a salary of \_\_\_\_\_ dollars per annum, and one Assistant Register of Copyrights at a salary of \_\_\_\_\_ dollars per annum, who shall have authority during the absence of the Register of Copyrights to attach the Copyright Office seal to all papers issued from the said office, and to sign such certificates and other papers as may be necessary. There shall also be appointed by the Librarian such subordinate assistants to the Register as may, from time to time be authorized by law.

SEC. 48. That the Register of Copyrights shall make daily deposits in some bank in the District of Columbia, designated for this purpose by the Secretary of the Treasury as a national depository, of all moneys received to be applied as copyright fees, and shall make weekly deposits with the Secretary of the Treasury, in such manner as the latter shall direct, of all copyright fees actually applied under the provisions of this act, and annual deposits of sums received which it has not been possible to apply as copyright fees or to return to the remitters, and shall also make monthly reports to the Secretary of the Treasury and to the Librarian of Congress of the applied copyright fees for each calendar month, together with a statement of all remittances received, trust funds on hand, moneys refunded, and unapplied balances.

SEC. 49. That the Register of Copyrights shall give bond to the United States in the sum of twenty thousand dollars, in form to be approved by the Solicitor of the Treasury and with sureties satis-

factory to the Secretary of the Treasury for the faithful discharge of his duties.

SEC. 50. That the Register of Copyrights shall make an annual report to the Librarian of Congress, to be printed in the Annual Report on the Library of Congress, of all copyright business for the previous fiscal year, including the number and kind of works which have been deposited in the Copyright Office during the fiscal year, under the provisions of this act.

SEC. 51. That the seal provided under the act of July eighth, eighteen hundred and seventy, and at present used in the Copyright Office, shall continue to be the seal thereof, and by it all papers issued from the Copyright Office requiring authentication shall be authenticated.

SEC. 52. That, subject to the approval of the Librarian of Congress, the Register of Copyrights shall be authorized to make reasonable rules and regulations, not inconsistent with the provisions of this act, for the conduct of proceedings with reference to the registration of claims to copyright as provided by this act: *Provided*, That no breach of such rules or regulations shall affect the validity of the copyright.

SEC. 53. That the Register of Copyrights shall provide and keep such record books in the Copyright Office as are required to carry out the provisions of this act, and whenever deposit has been made in the Copyright Office of a title or copy of any work under the provisions of this act he shall make entry thereof.

SEC. 54. That in the case of each entry the person recorded as the claimant of the copyright shall be entitled to a certificate under seal of copyright registration, to contain his name and address, the title of the work upon which copyright is claimed, the date of the deposit of the required copies of such work, and such marks as to class designation and entry number as shall fully identify the entry. In the case of a book the certificate shall also state the receipt of the affidavit required by section thirteen of this act, and the date of the completion of the printing, or the date of the publication of the book, as stated in the said affidavit. The Register of Copyrights shall prepare a printed form for the said certificate, to be filled out in each case as above provided for, which certificate, sealed with the seal of the Copyright Office, shall, upon payment of the prescribed fee, be given to any person making application for the same, and the said certificate shall be admitted in any court as *prima facie* evidence of the facts stated therein.

SEC. 55. That the Register of Copyrights shall fully index all copyright registrations, and shall print at periodic intervals a catalogue of the titles of articles deposited and registered for copyright, together with suitable indexes, and at stated intervals shall print complete and indexed catalogues for each class of copyright entries, and thereupon shall have authority to destroy the original manuscript catalogue cards containing the titles included in such printed volumes and representing the entries made during such intervals. The current catalogues of copyright entries and the index volumes herein provided for shall be admitted in any court as *prima facie* evidence of the facts stated therein as regards any copyright registration.

SEC. 56. That the said printed current catalogues as they are issued shall be promptly distributed by the Copyright Office to the collectors of customs of the United States and to the postmasters of all ex-



change offices of receipt of foreign mails, in accordance with revised lists of such collectors of customs and postmasters prepared by the Secretary of the Treasury and the Postmaster-General, and they shall also be furnished to all parties desiring them at a price to be determined by the Register of Copyrights, not exceeding five dollars per annum for the complete catalogue of copyright entries and not exceeding one dollar per annum for the catalogues issued during the year for any one class of subjects. The consolidated catalogues and indexes shall also be supplied to all persons ordering them at such prices as may be determined to be reasonable, and all subscriptions for the catalogues shall be received by the superintendent of public documents, who shall forward the said publications; and the moneys thus received shall be paid into the Treasury of the United States and accounted for under such laws and Treasury regulations as shall be in force at the time.

Sec. 57. That the record books of the Copyright Office, together with the indexes to such record books, and all works deposited and retained in the Copyright Office, shall be open to public inspection at convenient times; and copies may be taken of the copyright entries actually made in such record books, subject to such safeguards and regulations as shall be prescribed by the Register of Copyrights and approved by the Librarian of Congress.

Sec. 58. That of the articles deposited in the Copyright Office under the provisions of the copyright laws of the United States or of this act, the Librarian of Congress shall determine what books and other articles shall be transferred to the permanent collections of the Library of Congress, including the law library, and what other books or articles shall be placed in the reserve collections of the Library of Congress for sale or exchange, or be transferred to other governmental libraries in the District of Columbia for use therein.

Sec. 59. That of any articles undisposed of as above provided, together with all titles and correspondence relating thereto, the Librarian of Congress and the Register of Copyrights jointly shall at suitable intervals determine what of these received during any period of years it is desirable or useful to preserve in the permanent files of the Copyright Office, and, after due notice as hereinafter provided, may within their discretion cause the remaining articles and other things to be destroyed: *Provided*, That there shall be printed in the Catalogue of Copyright Entries from February to November, inclusive, a statement of the years of receipt of such articles and a notice to permit any author, copyright proprietor, or other lawful claimant to claim and remove before the expiration of the month of November of that year anything found which relates to any of his productions deposited or registered for copyright within the period of years stated, not reserved or disposed of as provided for in sections fifty-eight and fifty-nine of this act: *And provided further*, That no manuscript of an unpublished work shall be destroyed during the term of its copyright without specific notice to the author, copyright proprietor, or other lawful claimant, permitting him to claim and remove it.

Sec. 60. That the Register of Copyrights shall receive and the persons to whom the services designated are rendered shall pay the following fees: For the registration of any work subject to copyright deposited under the provisions of this act, every dollar, which sum is

to include a certificate under seal. For every additional certificate under seal of registration made, fifty cents. For recording and certifying any instrument of writing for the assignment of copyright, or for any copy of an assignment, duly certified, if not over three hundred words in length, one dollar; if more than three hundred and less than one thousand words in length, two dollars; if more than one thousand words in length, one dollar for each one thousand words and fraction thereof over three hundred words. For comparing any copy of an assignment with the record of such document in the Copyright Office and certifying the same under seal, one dollar. For recording the transfer of the proprietorship of copyrighted articles, ten cents for each title of a book or other article in addition to the fee prescribed for recording the instrument of assignment. For any requested search of Copyright Office records, indexes, or deposits, fifty cents for each full hour of time consumed in making such search. For the personal inspection of copyright record books, indexes, applications, or any article deposited, including the copying of an entry actually made in any such record book, ten cents in the case of each book or other article: *Provided*, That for such inspection or copying, or both, if made by or on behalf of any person party to a copyright suit already begun or if the inspection and use of a book or other deposited article is made in the reading room of the Library of Congress, or in any division of the Library to which the said article would naturally pertain, no charge shall be made: *Provided further*, That only one registration at one fee shall be required in the case of several volumes of the same book or periodical deposited at the same time or of a numbered series of any work specified in subsections (h), (j), (k), and (l) of section five of this act, where such series represents the same subject with variances only in pose or composition and the items composing it are deposited at the same time under one title with a view to a single registration.

SEC. 61. That in the interpretation and construction of this act the words "United States" shall be construed to mean the United States and its territorial possessions, and to include and embrace all territory which is now or may hereafter be under the jurisdiction and control of the United States.

SEC. 62. That in the interpretation and construction of this act words importing the singular number shall be held to include the plural, and vice versa, except where such construction would be unreasonable, and words importing the masculine gender shall be held to include all genders, except where such construction would be absurd or unreasonable.

SEC. 63. That in the interpretation and construction of this act "the date of publication" shall in the case of a work of which copies are reproduced for sale or distribution be held to be the earliest date when copies of the first authorized edition were sold or placed on sale; and the word "author" shall include an employer in the case of works made for hire.

SEC. 64. That all acts and parts of acts inconsistent herewith are hereby repealed, save and except section forty-nine hundred and sixty-six of the Revised Statutes, the provisions of which are hereby confirmed and continued in force, anything to the contrary in this act notwithstanding.

**LIST OF PERSONS PRESENT AT THE HEARINGS BEFORE THE  
SENATE AND HOUSE COMMITTEES ON PATENTS DECEMBER  
7-11, 1906, ON THE COPYRIGHT BILL.**

Senators Kittredge, Clapp, Foster, Latimer, Mallory, Smoot.  
Representatives Currier, Barchfeld, Bonynge, Campbell, Chaney,  
Gill, Hinshaw, Legare, McGavin, Webb.

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Other Representatives present: Hon. Charles E. Littlefield, Hon.  
James B. Perkins, Hon. George A. Loud, Hon. David J. Foster.

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Herbert Putnam, librarian of Congress.  
Thorvald Solberg, register of copyrights.

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Byron S. Adams, Washington, D. C.  
William W. Appleton, president American Publishers' Copyright  
League.

Charles B. Bayly, secretary Music Publishers' Association of the  
United States.

W. V. R. Berry, representing Reginald De Koven, esq.

Arthur E. Bostwick, representing the American Library Associa-  
tion.

J. F. Bowers, president Music Publishers' Association of the  
United States.

R. R. Bowker, vice-president American (Authors') Copyright  
League.

Glenn Brown, secretary American Institute of Architects.

Aldis B. Browne, counsel Photographers' Copyright League of  
America.

Joseph Buffington, district judge third circuit, western district  
Pennsylvania.

Nathan Burkan, counsel Music Publishers' Association of the  
United States.

Charles S. Burton, representing manufacturers of automatic mu-  
sical instruments and perforated-roll controllers.

George L. Canfield, counsel Print Publishers' Association of  
America.

Melville Church, Washington, D. C.

Samuel L. Clemens.

D. Crawford.

Paul H. Cromelin, representing Columbia Phonograph Company.  
Benjamin Curtis, secretary Print Publishers' Association of America.

William P. Cutter, librarian, Forbes Library, Northampton, Mass.  
N. E. Dawson, Washington, D. C.

James W. Dougherty, secretary International Brotherhood of Bookbinders.

Louis M. Duvall, representing American Newspaper Publishers' Association.

Frank L. Dyer.

B. J. Falk, president Photographers' Copyright League of America.

J. L. Feeney, president Bookbinders' Union.

Leo Feist, music publisher, New York.

Harry Edward Freund, representing The Musical Age.

George W. Furniss, representing Music Publishers' Association of the United States.

Robert Glockling, president International Brotherhood of Bookbinders.

H. W. Gray, music publishers, New York, N. Y.

E. G. Grimm, Hamburg, Germany.

Rev. Edward Everett Hale, chaplain United States Senate.

C. Paul Hamilton, representing Perforated Music Roll Company, of New York, N. Y.

D. C. Harrington, representing International Text-Book Company, of Scranton, Pa.

F. W. Hedgeland, representing the W. W. Kimball Company, of Chicago, Ill.

Victor Herbert, representing composers of music.

Jacob Heyl, representing Chase & Baker Company, manufacturers of piano players.

William H. Hollis.

William Dean Howells.

George J. Jackson, representing New York Typographical Union, No. 6.

R. U. Johnson, secretary American (Authors') Copyright League.

S. L. Kaufman.

Hyland C. Kirk.

Eugene De Kleist, president The De Kleist Musical Instrument Manufacturing Company.

Albert Krell, president Auto-Grand Piano Company, of Newcastle, Ind.

William A. Livingstone, president Print Publishers' Association of America.

H. N. Low, representing manufacturers of music rolls.

Alfred Lucking, counsel Association of American Directory Publishers.

Pirie MacDonald, representing Photographers' Copyright League of America.

Philip McElhone, representing the W. W. Kimball Company, of Chicago, Ill.

W. M. McKinney, representing the Ed. Thompson Company, Northport, L. I.

A. Bell Malcomson, representing McLoughlin Brothers.

Philip Mauro, counsel American Graphophone Company.

Joaquin Miller.

Frank D. Millet, representing National Academy of Design.

Samuel E. Moffett, Mount Vernon, N. Y.

Charles P. Montgomery, customs division, Treasury Department.

James J. Murphy, president New York Typographical Union,  
No. 6.

Theodore W. Noyes, chairman copyright committee, American  
Newspaper Publishers' Association.

John J. O'Connell, representing manufacturers of automatic piano  
players.

George W. Ogilvie, book publisher, Chicago, Ill.

Thomas Nelson Page.

Horace Pettit, representing Victor Talking Machine Company.

Charles Porterfield, Northport, L. I.

George W. Pound, counsel Rudolph Wurlitzer Company, Cin-  
cinnati, Ohio.

George Haven Putnam, secretary American Publishers' Copyright  
League.

R. R. Ray.

R. A. Rodesch, president Rodesch Piano Player Company, Dixon,  
Ill.

H. J. Schutters.

G. S. Schlotterbeck.

John Philip Sousa, representing composers of music.

G. W. Scott, law librarian, Library of Congress.

Abram R. Serven, counsel Music Publishers' Association of the  
United States.

Bernard C. Steiner, librarian, Enoch Pratt Free Library, Balti-  
more, Md.

Arthur Steuart, chairman copyright committee, American Bar  
Association.

J. J. Sullivan, chairman copyright committee, International Typo-  
graphical Union.

Arthur W. Tams, music publisher, of New York, N. Y.

J. L. Tindale, representing G. Schirmer, New York, N. Y.

Albert H. Walker.

H. C. Wellman, librarian, City Library, Springfield, Mass.

Ansley Wilcox, representing Consolidated Lithographic Company  
and other clients interested in poster printing.

Jay Witmark, representing M. Witmark & Sons.

B. F. Wood, music publisher, Boston, Mass.

Howard E. Wurlitzer, vice president Rudolph Wurlitzer Com-  
pany, Cincinnati, Ohio.



## COPYRIGHT BILL.

COMMITTEE ON PATENTS,  
UNITED STATES SENATE,

*Washington, D. C., Friday, December 7, 1906—10.30 a. m.*

The committee met at the Senate Reading Room, Library of Congress, jointly with the House Committee on Patents.

Present: Senators Kittredge (chairman), Clapp, Smoot, Mallory, and Latimer; Representatives Currier, Hinshaw, Bonyng, Campbell, Barchfield, Chaney, McGavin, Legaré, Webb, and Gill.

Present also: Herbert Putnam, esq., Librarian of Congress; Thorvald Solberg, esq., Register of Copyrights, and many others.

The LIBRARIAN. Messrs. Chairmen, I suppose that you will desire that all the gentlemen present shall be registered as they were at the hearings in last June. Their names will be sought, but any whose names have not been taken down will please give them to the attendant whom they will find at the desk on leaving the room.

Messrs. Chairmen, since the last hearing certain documents have been printed which are at the disposal of any person interested in the bill. The printed record of the hearings, of course; also a comparison and analysis of the pending bill with a comparison of existing provisions of law. This is printed and has just been issued by the Copyright Office. Also a verbatim reprint of the copyright enactments of the United States from 1783 down to date; an attempt at a tabulated statement of the amendments to the bills proposed to date, and also a note of suggestions and criticisms which did not take the form of definite phraseology. This is brought down to December 4 by addenda and a supplementary addendum which contains a comparison of the provisions of a substitute draft bill which has just reached the Copyright Office with the provisions of the pending bill.

Mr. Chairman, you have indicated as perhaps most useful to the committee some attempt to group the discussion to-day and to-morrow so that the discussion of identical provisions would all come upon those provisions. We have applications for time which would aggregate thirteen or fourteen hours. It would be practically impossible now, we presume, to lay out a definite programme even for these two days. It has been suggested, however, by Mr. Cromelin, the president of the American Musical Copyright League, which is particularly interested in what are denominated paragraph G and its dependents, and appears in opposition to those provisions, that from its point of view it would be desirable to have as many as possible of the other provisions of the bill disposed of before particular discussion is had upon these provisions. Am I right, Mr. Cromelin?

Mr. CROMELIN. Yes.



The LIBRARIAN. That with a view of more effective discussion on those provisions when it is to come. Mr. Cromelin understands that it is the intention of the committee to see that ample discussion is to be had, and to make all provision in its power to provide for it.

Therefore it has seemed, in accordance with that suggestion, if it is adopted, that the logical first item on the programme this morning would be a statement from Mr. Burton pointing out the essential respects in which his substitute bill intentionally differs from the pending bill—not arguing the proposals, but simply pointing out the provisions as matters of fact and intention—and he says that he can do that in twenty minutes.

Would it be your pleasure to hear Mr. Burton?

Mr. CURRIER. Mr. Chairman, I received a communication last night from Mr. Hedgeland, of Chicago, which led me to think he desired to be heard early in the day. I would suggest, therefore, that Mr. Hedgeland be given the first thirty minutes of the time and then that Mr. Burton be given such time as he desires.

The CHAIRMAN. Very well.

Mr. CURRIER. Is Mr. Hedgeland here?

Mr. HEDGELAND. Yes, sir.

The LIBRARIAN. The chairman suggests that you be given your thirty minutes now, Mr. Hedgeland.

**STATEMENT OF F. W. HEDGELAND, ESQ., OF CHICAGO.**

The LIBRARIAN. Mr. Hedgeland, will you give your full name, please, and whom you are representing, unless you speak simply for yourself?

Mr. HEDGELAND. Frederick W. Hedgeland, Chicago, Ill.; representing myself, the musical interests, and the public.

The CHAIRMAN. What is your business, Mr. Hedgeland?

Mr. HEDGELAND. I am an inventor, sir.

The CHAIRMAN. Along what line?

Mr. HEDGELAND. Musical instruments and other lines. I have patented over forty or fifty devices which are used in automatical musical instruments.

The CHAIRMAN. You may proceed.

Mr. HEDGELAND. At the close of the last hearing in this room, on June 9, I became interested in seeing the documents, the records of the conferences, and went up to the Library with a request to the Librarian for permission to go through the records and see any documents that might lead up to the presentation of this bill, especially as to applying to the instruments in which I am interested. I had the files placed at my disposal, and, with help, went through the entire mass of correspondence. In going through the whole correspondence I failed to find a single, solitary letter from any one composer petitioning or asking for protection under a measure of this kind. On the other hand, from the date of the first proposed conference there was abundant evidence that musical associations, or the Music Publishers' Association, were going to ask for protection for mechanical musical instruments. It appears amongst the very first communications prior to the first conference, or at the first conference.

Farther along in the correspondence there are numbers of letters from individuals asking for information as to what was being done

at these conferences, and none of them obtained any satisfaction or any information from the Librarian unless they were members of some affiliated associations which had taken part in the conference. I have some original letters where application was made for information from parties who were vitally interested in the measure. They received the information that when the bill was presented they would have no difficulty whatsoever in securing a copy of it. Is that the way to treat all interests alike?

The CHAIRMAN. Mr. Hedgeland, you are now appearing before a joint committee of the Senate and House.

Mr. HEDGELAND. Yes, sir.

The CHAIRMAN. And you are having an opportunity to present whatever claims you have in reference to the proposed legislation.

Mr. HEDGELAND. Yes, sir; I am trying to get at the merits of the bill.

The CHAIRMAN. And I would suggest that you confine your discussion to the merits of the bill with which the committee has to do.

The LIBRARIAN. Mr. Chairman, Mr. Hedgeland has asked only thirty minutes. His idea of what is relevant, what bears on the merits, may not be identical with some one else's. I beg that he be allowed to use his thirty minutes as he thinks best.

The CHAIRMAN. Very well.

Mr. THOMAS NELSON PAGE. If I may say so, Mr. Chairman, it seems to me that the chairman is the judge of what is pertinent in this particular case. There must be a judge of what goes to the merits of the bill, and it seems to me we shall not get at the merits unless the chairman decides and rules what does go to the merits.

The LIBRARIAN. I understood Mr. Currier to say, Mr. Chairman, that owing to a communication he had received he particularly desired to hear from Mr. Hedgeland now, and there may be reasons of which Mr. Page may not be aware that would make it desirable for Mr. Hedgeland to be free to use his time as he wishes.

Mr. CURRIER. So far as I am personally concerned, I would like Mr. Hedgeland to take his own line.

The CHAIRMAN. Very well; you may have your thirty minutes, and take your own course in reference to it.

Mr. HEDGELAND. Amongst the correspondence there are letters from the Chase & Baker Company which came to my notice, in which they fully set forth what they feared was being done in the preparation of this bill, but on which they were unable to secure any information. A copy of those letters, which were written to Messrs. Schumann, were sent to the Librarian's office by Mr. Haven Putnam, of New York. They set forth how this monopoly of the Æolian company was anticipated, and that if legislation of this kind took place it would instantly create a monopoly. Those letters of the Chase & Baker Company that were addressed to Messrs. Schumann were sent by the Librarian of Congress to Boston, to Mr. Bacon, of the White-Smith Music Publishing Company, with the statement that he thought they would make interesting reading. I have certified copies of many letters along the same line, where people have written and asked and positively been stood off until this bill was presented. The merits of the case show, as far as it applies to mechanical musical instruments, that the composers, the true beneficiaries under this bill, never petitioned for it.

Mr. CURRIER. Mr. Sousa and Mr. Herbert and other composers have appeared before the committee.

Mr. HEDGELAND. Yes, sir; but there is not a letter, before this matter was agitated or the conferences called, asking for it. That is in sharp contrast to the Librarian's statement here before this committee on June 9, when he stated: "Did any of you ask for this information? Was there not every reason to believe that such a measure would be incorporated? Did you ask for it? You know you did not." The evidence is, and I have lots of letters to prove, that it was asked and it was practically, to all intents and purposes, refused.

I can not understand, gentlemen, I can not picture any manufacturer, whether of phonographs or automatic players, walking up and asking to be taxed, whether it is 10 per cent, 5 per cent, or whatever it is, unless there is some special privilege that he is going to obtain under this measure. Nowadays the whole trend of business is to reduce the cost of a product, not to increase it. I think it is plain on the face of it.

Before I close I would like the committee at their leisure to take up the matter which I left with them last night, and I will submit briefs and copies. With that I will let the matter rest.

Mr. HINSHAW. I think you had better explain the matter a little bit to us now, for I am afraid we will never read them; that is, I am afraid I will never read them. We have too many things to do.

Mr. HEDGELAND. It is much better in brief form, sir, with the exhibits.

Mr. HINSHAW. But would you mind explaining just what you want in this bill?

Mr. HEDGELAND. Anything that is fair and equitable to the public and all concerned is what I want. I do not want any special privilege.

Mr. LEGARE. What is your idea of what is fair and right? Give us that.

Mr. HEDGELAND. That I have not given any thought to, sir; any measure that will not force the entire population of this country to pay tribute to one or two individuals.

Mr. HINSHAW. Just explain just how that would occur. How would one or two individuals have a monopoly?

Mr. HEDGELAND. Because, sir, the whole thing has been anticipated by contracts with the Music Publishers' Association. The whole thing is bartered in advance; and if that bill which is presented had ever become a law the major portion of the mechanical musical instruments of this country would have been just wiped right out.

Mr. CURRIER. Have you any complaint to make or have you heard anybody make any complaint that did not have the most ample opportunity to be heard here?

Mr. HEDGELAND. In the room here? No, sir.

Mr. CURRIER. Yes; or at any time since this bill was introduced?

Mr. HEDGELAND. In here?

Mr. CURRIER. No; in Congress.

Mr. CHANEY. We are the committees of Congress here, you know.

Mr. CURRIER. Since the bill was introduced?

Mr. HEDGELAND. No, sir.

Mr. CURRIER. Has not all possible information been given to everybody?

Mr. HEDGELAND. Yes, sir.

Mr. CURRIER. You have no complaint, then, to make about that?

Mr. HEDGELAND. No, sir; none whatever. The only complaint I have to make—and I believe I am in the right—is in the preparation of the bill and the way the public interests were handled preparatory to its submission to this committee.

Mr. CURRIER. Of course, you understand that during the preparation of it no Member of Congress was consulted?

Mr. HEDGELAND. I understand that, sir.

Mr. CURRIER. No Member of Congress knew anything about the bill until at the time of its introduction.

Mr. HEDGELAND. I fully appreciate that, sir; I appreciate that.

Mr. CURRIER. No member of the Senate, nor any Member of the House.

Senator MALLORY. Will you state specifically what fault you have to find with this bill—what particular parts are objectionable to you?

Mr. HEDGELAND. Paragraph G.

Mr. BONYNGE. Paragraph G of what section?

Mr. HEDGELAND. Section 1.

Mr. BONYNGE. What bill are we considering, Mr. Chairman? We have so many different bills here that I do not know which bill we are considering.

The REGISTER OF COPYRIGHTS. It is in this brown pamphlet, arranged as the Librarian has stated.

The CHAIRMAN. We are considering Senate bill 6330 and House bill 19853. It is printed in this book which I hold in my hand.

Senator MALLORY. Is this the paragraph you refer to?

Mr. CHANEY. Will somebody name the page, so that we can get it?

The CHAIRMAN. Page 9.

The LIBRARIAN. This paragraph G, gentlemen, is the paragraph relating to the music devices, music reproduced by a mechanical device. It belongs to the set of provisions which had been suggested to be discussed by themselves.

Mr. CHANEY. Yes; I remember. That is it.

Mr. HINSHAW. Now, if you will permit me, will you not explain how section G, to which you refer, would bar all the music-instrument-making houses except one or two from making and selling different kinds of musical devices?

Mr. HEDGELAND. You wish me to explain how that would do that, sir?

Mr. HINSHAW. Yes.

Mr. HEDGELAND. Because a contract exists—a thirty-five-year contract—between members of the Music Publishers' Association and the Æolian Company, a corporation of New York City, giving them the exclusive rights under all their musical compositions in perforated-roll form.

Mr. CURRIER. What evidence of it have you?

Mr. HEDGELAND. That that contract exists?

Mr. CURRIER. Yes.

Mr. HEDGELAND. Why, I have copies of it.

Mr. CURRIER. Suppose you put them into the record.

Mr. HEDGELAND. All right, sir.

The LIBRARIAN. Those were put into the record last summer, Mr. Chairman.

Mr. HEDGELAND. They were put into the record the last time, sir; they are already in the record.

Mr. CHANEY. How would you modify this language to avoid what you say is the trouble?

Mr. BONYNGE. By striking it out altogether, I suppose.

Mr. HEDGELAND. I do not know, sir; I am not a lawyer.

Mr. CHANEY. Would you strike out the paragraph altogether?

Mr. HEDGELAND. I should; yes, sir. As far as I can find out, no composer ever asked for it to be inserted. That appears from the pen and is the combined work of the Publishers' Association and their lawyers.

The CHAIRMAN. Have you read the evidence that was given before the joint committee in June last by Mr. Sousa and Mr. Herbert and other composers?

Mr. HEDGELAND. Yes, sir. I am talking about Paragraph G, and how it came into the bill.

Mr. CURRIER. They refer to Paragraph G. Mr. De Koven, I think, is present. He appears in favor of it.

Mr. HINSHAW. I do not yet understand this point, Mr. Hedgeland. How would the inclusion of this section in the bill prevent any other company or organization from making musical devices and having them copyrighted than the ones to which you refer?

Mr. HEDGELAND. Because the music publishers are in association at the present day, and (to use their own expression) all the publishers of any consequence in the country but two are members of the association, and the members have contracts similar to the one that is in the record giving this one concern the sole right to use those musical compositions in mechanical reproduction.

Mr. CURRIER. Mr. Hinshaw, may I say that ample time will be given to this a little later on?

Mr. HINSHAW. All right.

Mr. CURRIER. So that if Mr. Hedgeland has anything further to say on any other line, let him take his time now.

Mr. HEDGELAND. No, sir; not any other line. That is all, thank you.

The CHAIRMAN. Have you any other criticism of the bill except subdivision G of section 1?

Mr. HEDGELAND. That is the only one that I have noticed, sir, that I am interested in.

The CHAIRMAN. Have you anything further that you wish to say at the present time?

Mr. HEDGELAND. No, sir.

The CHAIRMAN. About the bill or the conduct of the Copyright Office?

Mr. HEDGELAND. At the present time?

The CHAIRMAN. Yes.

Mr. HEDGELAND. If I am to be heard later, no, sir.

Mr. CURRIER. You are not to be heard later; you have been given thirty minutes, and the committee desire you to close your statement to-day.

Mr. HEDGELAND. Well, sir; I am through.

**STATEMENT OF HERBERT PUTNAM, ESQ., LIBRARIAN OF  
CONGRESS.**

The LIBRARIAN. Mr. Chairman, I must interpolate, not a discussion, but a reflection. It is, I hope, the only period of a few minutes that it will be necessary to take for the Copyright Office in an ego-tistic capacity.

Immediately after the hearings of June last Mr. Hedgeland was given the freedom of our office files. With an attorney and stenographer he went through them. He went through the four volumes of the records of the copyright conferences; the sixteen volumes of correspondence, which include every letter received by the Register or myself, and copies of every letter written by us relating to the conferences, the bill, or the project. He went through those. What he has found—to his purpose—he has merely indicated to you; but he has extended at greater length in a communication to the President; and at some length, with documents, in communications to the Musical Age.

I answered the communication to the President, because etiquette required me to. I did not answer the communication to the Musical Age, because I do not argue the integrity of my office in the public press. I suggested to the American Musical Copyright League that if, as indicated by these communications of Mr. Hedgeland, by some remarks of Mr. Cameron at the last hearings and at meetings of the league, and by one or two other evidences, there was a grievance against the Copyright Office we were perfectly ready to have it made a special issue, and to deal with it then. I could not ask that the gentlemen who have come here, this large company, interested not in the conduct of the Copyright Office, but in the merits of this bill, should listen to a discussion of these matters now.

Mr. Hedgeland found a conspiracy—a conspiracy in which the Copyright Office was an accomplice. He has fastened it upon the music publishers. But he has overlooked the book publishers. This bill gives them certain benefits. They were at the conferences. Undoubtedly *they* were at the bottom of the bill; and there is the more reason to think this, Mr. Chairman, because they had already sought these very benefits in a separate bill introduced before these conferences were thought of; and for the further reason that the Librarian of Congress is brother to the secretary of their league. Undoubtedly the book publishers were at the bottom of this bill. He has overlooked the activities of the directory publishers. This bill for the first time specifies directories as subject-matter of copyright. Undoubtedly the directory publishers were at the bottom of it. The print publishers, the photographers, would gain special benefits by it, and certain reliefs. Undoubtedly *they* were at the bottom of it. Then, besides the composers there was the whole creative class of authors and artists. They get a longer term, a simpler form of notice, relief from certain fatalities now experienced, and ampler compensation in case of infringement. No doubt *they* were at the bottom of it.

There is more reason to think this because many of them are friends, and some, intimates, of the Librarian of Congress; and because the Librarian is the son of his father—a publisher noted for

his weakness to the claims of authors' (which he recognized in his own business, not always to his own advantage), and quite prominent in promoting protection to literary property. In the case of the authors there were prenatal influences at work upon the Librarian.

But, if suspicion must rest upon these classes, Mr. Chairman, there is one group that can be convicted offhand, and that is the typographers. The typographers gain in this bill their affidavit clause, which they had sought in a special bill introduced a year before these conferences were thought of; and there is the more reason to think them at the bottom of it because the very interview between Chairman Kittredge and myself at which these conferences were suggested related to that affidavit bill. And the complicity of the Copyright Office in the interest of the typographers is the more shameless, Mr. Chairman, because it is well known that both the Register and myself disapproved of that affidavit bill when introduced. By what illicit influence, Mr. Chairman, were we induced to "come around?" What was the consideration?

The record of the conferences shows a unanimous vote on the part of the conferees that the salary of the Register (I shall take but a few moments, Mr. Chairman) should be increased to \$5,000. It is clear how the Register was "brought round." Mr. Sullivan did not introduce that resolution, but that makes the proof perfect. For in a conspiracy the most suspicious circumstance is the result that you suspect, brought about in the way one would not have expected.

Mr. Chairman, if once one gets a clear notion of a conspiracy, many things become significant which the simple-minded might pass. At the outset of the conferences I suggested to the conferees that they had better postpone moral yearnings to a future generation. For "moral yearnings" Mr. Hedgeland reads "moral compunctions"; and what might have been thought an exhortation to them to postpone the ideal in favor of the practicable becomes a suggestion to them to take everything they can get without any regard to the rights of others.—Mr. Bowker invites the Librarian to lunch with him. As they are starting out, Mr. Victor Herbert and Mr. Burkan, as if by accident, drop into Mr. Bowker's office, and the four go along together. Mr. Bowker, you will have to prove that that luncheon was not paid for by the music publishers. [Laughter.]

A meeting was held in this room on June 5, the day before your hearing. It was to be a meeting of participants in the conferences. It was called as such by the Copyright Office, and no other call was authorized by that Office. But the conferees who met here, proceeding as they supposed they had a right to, attempted to pass a resolution with regard to the presentation of the bill the next day. Certain other gentlemen were here, six or eight, who had come on the remarkable supposition that that meeting was for an open public discussion of this bill on its merits. I say "remarkable supposition," because the hearing before the committee was to be the very next morning. And they blocked the passage of that resolution, which they might perfectly properly hold, of course, could not commit themselves, but which was not intended to commit them.

At the organization of the American Musical Copyright League a description was given of that meeting by Mr. Cromelin, who was present. Mr. Cromelin has since written me that he intended that

description to convey no imputation upon the Copyright Office—a very friendly, pleasant letter, signed “With the greatest respect”—and that it was meant to be simply a statement of facts. There were some errors of fact, but I do not for a moment intimate that those were intentional. But, Mr. Cromelin, just as I received your reply I was thinking of sending that statement, which was published in the *Musical Age*, to a daughter of mine at college, as a model of innuendo: by which I mean that gentle art of coloring a fact so as to convey an insinuation. I have not sent it because you say that it was not meant that way.

Mr. Chairman, once grasp the idea of conspiracy and many things become plain. They became plain to Mr. Hedgeland. But one thing is not plain: What was the *consideration*, the inducement to the Copyright Office to enter into this conspiracy? I am not speaking of an outside trade conspiracy. That is a different matter—this *Æolian* conspiracy. I mean this conspiracy that has been brought before you, that has been brought before the public, implicating the Copyright Office. What was our inducement?

Mr. Hedgeland appears not to have found it, but when he does it will create a sensation, because it must have been something very substantial. You can judge that if you will consider for a moment what we had to face in this project. If one result was certain from it, it was that the Copyright Office itself would come out of it with neither glory nor popularity. The bill is a copyright bill. It therefore promotes a monopoly—a legalized monopoly, to be sure, but still a monopoly—and monopolies are just now in disrepute. We could not expect that it would be popular with the general public. Any particular interest, any interest injuriously affected by it, was certain to denounce the bill and would be apt, without careful study of the history of it, to denounce the Copyright Office. Nor were we likely to be compensated by the enthusiasm of the proponents of the bill, because every interest in the conferences is in some measure disappointed in the bill as it stands and may be more disappointed when it is reported. But the worst consequence was that we were certain to lose credit with this committee. We presented the bill without prejudice, and that was to present it without any questions or doubts of our own. Now, the Register, I know, disapproves certain of its provisions. I may, for aught he knows, disapprove others. We can not communicate any doubts of our own to this committee in advance. To do so would be to present the bill with one hand and stab it in the back with the other. The consequence will be that any credit to us for an independent judgment on these matters is not to be hoped from your committee.

I say that we can hope for neither glory nor popularity from this measure. Out of favor with the proponents, denounced by the opponents, unpopular with the public, and probably more or less discredited by the committee—that was the prospect! [Laughter.]

A farmer, returning one day, was told of a succession of disasters that had befallen him in his absence. His barn, his house, his horse, his cow, his wife, his child—all were gone. As the recital proceeded, instead of breaking down, he broke up, and at the last item he burst into a loud guffaw. “What was he laughing at?” “Oh, but it is so (d——) *complete*!” [Laughter.]



The CHAIRMAN. Now we will hear Mr. Burton.

**STATEMENT OF CHARLES S. BURTON, ESQ., OF CHICAGO, ILL.**

The CHAIRMAN. Mr. Burton, will you not state your name to the stenographer?

Mr. BURTON. Charles S. Burton.

The CHAIRMAN. Where do you live?

Mr. BURTON. In Chicago, Ill.

The CHAIRMAN. What is your business or profession?

Mr. BURTON. Lawyer.

The CHAIRMAN. And whom do you represent?

Mr. BURTON. I represent directly a client, the Melville Clark Piano Company, manufacturers of musical instruments, and the Q. R. S. Company, manufacturers of perforated rolls.

The CHAIRMAN. You present, as I understand, the bill that is upon our desks here, purporting to be submitted in behalf of the Clark Piano Company?

Mr. BURTON. Yes; so entitled in order that there may be no misunderstanding.

The CHAIRMAN. How much time do you wish?

Mr. BURTON. I think I can state what the Librarian indicated he desired I should state at this point in not to exceed twenty minutes, with the understanding that that matter is not to be discussed at this point, because I could not discuss the points in that time; but when the committee arrives at the point of taking up this subject, or the subjects which may be involved here later—and this matter may have had criticism—I should be glad if I might be heard to answer criticisms, if it is desired. I should be willing, if the committee preferred, to handle the whole matter now, but I understand that is not the programme. The suggestion that the matters touching automatic appliances for reproducing audible speech or music should be discussed later seemed a little bit inconsistent with this statement at this time, because in the main and vitally the matters of change I suggest relate to that subject. But nevertheless I will state in outline at this point, at the request of the committee, my suggestions.

The CHAIRMAN. In what respect does the bill you propose differ from the bill introduced in Congress?

The LIBRARIAN. That was to be his statement, sir—to point out the essential particulars in which the bill differs from the pending bill.

The CHAIRMAN. We will be glad to hear your statement from that point.

Mr. BURTON. Now, if the committee will refer to the pending bill by the sections as I shall name them, I can state by that reference most easily the differences.

The LIBRARIAN. You have on your desks, gentlemen, this printed statement, which contains what he proposes to refer to.

Mr. BURTON. Perhaps you may find it convenient to refer to that, although my references will be directly to the sections of the pending bill. The comparisons in detail are made there. I am not going to follow those detailed comparisons. They will be too numerous to be covered in twenty minutes. But by referring to section 1 of the pending bill, which states the scope of copyright, and comparing

that with the corresponding sections of the substitute, some differences will be noted which I will mention.

In the first place, I should have said the numbers I refer to, though so far they agree, will be to the sections as numbered in the substitute bill instead of the pending bill; and copies of that are also, I understand, before the members of the committee.

In section 1 of the substitute draft, in the first place, there is included musical-dramatic with dramatic compositions as protected in respect to performance. In that respect the substitute differs from the pending bill; and from certain interpretations, which I believe to be incorrect, of the present statute, which covers all musical performance. I limit it in this modification to musical-dramatic performance, conceiving that to have been the intention of the present statute.

Second. This statement of the scope of copyright in the substitute recognizes a broad distinction between the original act and what may be called the various outgrowths, such as dramatizing, digesting, etc., which are stated in the sub-sections as the only ones that want the further protection. That change of statement of scope is found to be necessary for consistency in carrying out the main purpose of the amendment which I started out to make, which, as I stated, related to the matter of devices for audible reproduction.

Turn to section 6 of the substitute bill (I shall be obliged to move rapidly, because I am trying to get through in twenty minutes)—the classification. By comparing that with the classification in the original bill differences will be noted; and there again I have proposed a reclassification in order to obtain consistency and convenience of reference to the classes in the other provisions.

Turn to section 13 of the substitute bill—the provision for registration, which it is required shall be accompanied by *prima facie* proof of authorship, as in the case of patents, that the party, the author, applying for registration shall make affidavit that he is the author, or that if the application is made by a party assignee of the author he shall accompany his application by proof of an assignment, except that provision is made also for anonymous authorship, as you will note by reference to that section.

MR. CURRIER. Mr. Burton, do you incorporate in your substitute bill the working clause that is embodied in the bill S. 6330?

MR. BURTON. The working clause? I do not quite get that.

MR. CURRIER. I mean the proviso there that protects the Typographical Union.

MR. BURTON. Yes. I have made no changes in many parts of the bill. Although I have embodied them in a unitary bill, I have simply transcribed them for the purpose of unitary presentation, and not because I have any opinions upon them. I do not attempt to touch many parts of the bill. I might oppose them, or I might favor them. In fact, in looking over the comments, I find many criticism from other parties that I might give you, but they are out of my scope, and I do not touch those features of the bill. Many sections, in fact the greatest bulk by measure of the bill, are simply transcribed for the purpose of getting it into unitary form. I thought it necessary.

I might say this by way of apology: It might seem an intrusion

into the province of the committee to present a bill in this way; but while my ideas were not inconsistent with the phraseology in some sections, it seemed to me best to follow the entire bill through with every change that I have thought to suggest. So I rewrote the bill, simply incorporating sections without change where no change was necessary. I trust the convenience of the committee which may be served by this will constitute sufficient excuse for the presumption perhaps involved in that intrusion into the committee's province.

MR. CHANEY. Have you noticed this print here, setting forth on one page the copyright bill, so-called, and your substitute draft on the other?

MR. BURTON. Yes; that has been done by the office, and that will serve. I will not go into those details now, but will simply state them in general; but the committee will find them all carried out in detail there. I have read the proof of that print, and while it was prepared by this office without my suggestion, it seems to have been very carefully done.

Section 13 I have mentioned.

Pass to section 20 of the substitute—the term of copyright. The change consists in limiting the copyright to twenty-eight years, as now, without provision for renewal; and as to the appliances for audible reproduction, limiting the term of patent to seventeen years.

I passed in its order point C, in respect to the scope of copyright, section 3 of the substitute bill, which provides expressly for copyrighting these appliances for audible reproduction in virtue of the artistic effort, as, for example, the voice of the singer in reproducing the device for audible reproduction, and the skill of the performer in playing on the musical instrument, and the skill of the producer in producing the perforated roll. This substitute recognizes that as having the same quality of authorship as the work of the photographer in selecting his point of view and posing his subject, and therefore allows a copyright for those appliances and limits the term.

Now I come to section 20. That limits the copyrights just mentioned to the term of the patents to which they are more closely analogous; and I may suggest there an oversight which occurred to me just now: There should be a limitation also at that point (it is not in the bill as printed) that the supplementary copyrights on these appliances should expire with the copyright on the composition which they reproduce. That is not in there, but I would suggest that.

Section 23, with regard to penalties and recoveries: The change consists in reducing the penalty in respect to devices for reproducing automatically from \$10, as in the bill, to \$1. The devices themselves sell for very much less than \$10. I presented my views on that subject to the committee before. The extravagance of these penalty provisions seemed to me unjust.

The change consists also in making the maximum limit of damages where no proof of actual damage was presented \$250, at the discretion of the court, instead of a minimum of \$250, as the bill now provides. That is where there was no proof whatever, and it was a matter simply of making a penalty that should be reasonable, regardless of any actual damage.

There is a slight change (slight in verbiage, though it may be material in effect) in subsection c of section 23, where provision was made for impounding and destroying all the devices for audible reproduction, which in the bill as it stands could be construed, and would, it seems to me, be likely to be construed, as involving the destruction of the entire operating plant. My suggestion of change there is adding the words "having no other use." That is, the appliances, devices, matrices, masters, etc., to be destroyed in case they are found infringing, should be those that have no use except for that purpose, so that it would not involve the destruction of machinery which has general use.

Section 39 of the substitute bill is an entire addition, and may be considered the vital point of the changes to which I have directed my attention. It consists in a provision recognizing an interest and a right on the part of the composer in respect of the automatic devices, devices for automatic reproduction audibly, which is apart entirely from his interest which the copyright directly protects. It provides that no person shall make, produce, or market these devices for audible reproduction without marking upon them the name of the author of the composition which they reproduce, and the title of his music, unless the author himself consents to the omission, and provides that the author shall be entitled to a royalty for the use of his name and his title, which may contribute to the sale of the devices—that royalty to be a reasonable one, and to be the same for all parties reproducing the same kind of device—that is, all who make a talking-machine device ought to have one royalty, uniform for all of them. Those who make a perforated roll ought to have a royalty uniform for all of them. Each royalty is to be fixed by agreement of parties, but in case they do not agree, by some manner in a court of equity, as set out here in detail. And in order to avoid collusion, which would defeat the result of that, I provide that the lowest royalty fixed by the court by agreement of the parties shall be the controlling one.

As that argument is not to be made at this point, I will make no statement—

The CHAIRMAN. As I understand, you desire to argue that question?

Mr. BURTON. I understand that the committee will wish later to hear argument upon that subject, and I will be glad to be heard at that time on all these details, so far as the committee is desirous of hearing me, and in some respects I should like to be heard.

The CHAIRMAN. Very well.

Mr. BURTON. There are two omissions which constitute material changes. Section 1, subsection C, of the original bill is entirely omitted. That section makes provision for the copyrighting of oral works, sermons, speeches, etc. That seems to me entirely beyond the proper scope of the copyright law, and I omit that entirely.

Paragraph 2 of section 10 of the original bill is entirely omitted. That provides for the filing of manuscripts not to be published, to give a copyright in them by virtue of their being filed. Both those sections seem to me outside the scope of such a bill.

If I have answered the present purposes of the committee in this general statement, that is all I care to say at this time.

The CHAIRMAN. Let me ask you this question: As I understand

from your remarks, the real purpose of your amendment relates to these musical devices?

Mr. BURTON. That was my purpose in starting out. Other changes, however—

The CHAIRMAN. The other changes have been made simply to make more perfect, as you think, the bill as introduced in Congress, and to carry out the plan that you have in mind, making it a systematic measure. Is that right?

Mr. BURTON. That is my point. There are some details that I might criticize that I am passing by entirely because they are not within the scope of the subject I was considering.

The CHAIRMAN. Your real proposition relates to the musical device controversy? Is that right?

Mr. BURTON. That is right.

The LIBRARIAN. Mr. Chairman: Mr. Ogilvie was given assurance that he should be heard to-day because he is obliged to return to Chicago this afternoon.

The CHAIRMAN. Very well.

The LIBRARIAN. He asked for but fifteen minutes.

**STATEMENT OF GEORGE W. OGILVIE, ESQ., OF CHICAGO, ILL.**

Mr. OGILVIE. Mr. Chairman and gentlemen of the committee, immediately after I left the conference in June Mr. Scott, of the Century Company, attempted to contradict some of the statements that I had made as to the necessity for the insertion of the American copyright notice in every edition of every book wherever it might be published. Mr. Scott contended that that was not necessary, and an ocular demonstration of the reason why Mr. Scott felt that that was not necessary is here in a copy of "Lovey Mary," a book of which the Century Company owns the copyright, but which is published abroad without a copyright notice. I think that clearly indicates Mr. Scott's desire to avoid the necessity for the insertion of that notice.

Mr. JOHNSON. Mr. Chairman, may I, as a member of the Century Company, tell the gentleman that the Century Company has no control over the English system of copyright registration or any of their customs in relation to the copyright? That is a matter which the British Parliament regulates.

Mr. OGILVIE. I have no desire to accuse Mr. Scott of attempting to govern British legislation. I simply say that the public in the United States are entitled to the protection which the laws here give them, and if I publish a book which contains no notice of copyright I should not lose the investment that I have made in the plates or be subjected to penalties because I am having published a book that does not comply with the laws of the United States. It is strictly within the ability of Congress to pass a law directing those who desire to retain a copyright in the United States as to what shall be done in every edition published wherever it may be published. The law as it stands to-day stops at the word "published," and does not require that the books be printed in the United States. The only requirement in that respect is contained in the revenue law.

For instance, if I publish a book in the United States, an American copyright book, and desire to have it printed in Canada, where

I can have it done for, say, 50 per cent of what it costs me here, and then import it at a duty of 25 per cent on the cost of producing there, am I to be permitted to leave out the American copyright notice and sell it in this country simply because it was printed abroad, and thus get other publishers in trouble who may unwittingly infringe, or wittingly, if you choose? I think not.

Mr. BONYNGE. What purpose is gained by omitting the notice of copyright?

Mr. OGILVIE. It is a sop thrown to the British public, who refuse to buy American books unless they are forced down their throats. [Laughter.] Now, I speak knowingly. Mr. Scott can laugh if he chooses, but I have been in business as a publisher in Great Britain, in London, and it was essential that I, because of my American pronunciation, should sit in the back office and have an Englishman represent me in the front office. [Laughter.] Now, these gentlemen can smile if they want to. My experience is not limited to Chicago, Mr. Scott, nor is it limited to New York. [Laughter.]

Mr. JOHNSON. Pardon me; I am not Mr. Scott; I am Mr. Johnson.

Mr. OGILVIE. Well, Mr. Johnson, then, or what happened to him. [Laughter.] The difficulties with which certain publishers have to contend in this country will be illustrated by the presentation to this committee of a copy of Webster's Brief International Dictionary. That is published in Great Britain with a title differing from that under which it is published in this country. The Copyright Office shows no entry of copyright, and yet a court has held that there is a valid copyright on that book. The first court held that there was not.

Mr. BONYNGE. Where was this book printed?

Mr. OGILVIE. It was printed in Great Britain, from American plates.

Mr. CURRIER. Was that because that identical book, with the single exception of the title, had been copyrighted abroad?

Mr. OGILVIE. No, sir; it was because a certain portion of that book—not all of it, but a certain portion of that book—was copyrighted in this book, Webster's High School Dictionary, in the United States; and certain of the plates were shipped abroad under contract from the owner of the American copyright, one of the provisions specifically providing that the American copyright notice should be eliminated from the foreign edition.

Mr. CURRIER. Mr. Ogilvie, suppose you had unwittingly begun to reproduce that book under this bill. Could you not go right on?

Mr. OGILVIE. Yes, sir; but what is the use of having that "unwittingly" proposition in there? Is not the man's copyright violated?

Mr. CURRIER. Would you invalidate a copyright because the publisher failed to attach the copyright notice to a single copy?

Mr. OGILVIE. No, sir; I would not if it were unwittingly done.

Mr. CURRIER. What would you do?

Mr. OGILVIE. Why, I would do just as the courts already have done—that if it were unwittingly done, or left out under a misapprehension, there should be no damages collected from the man who infringed that copyright, but that he should discontinue the infringement.

Mr. BONYNGE. What section of the bill are you referring to?

Mr. OGILVIE. I regret to say that my copy of the bill is lost.

Mr. CURRIER. The bill provides that the omission must be by inadvertence. That provision is contained in section 15.

Mr. OGILVIE. But if he knows that it was done by contract and the courts uphold the copyright on that particular book——

Mr. CURRIER. I know; but you are speaking about existing law. Suppose this bill is adopted—just turn to page 12, line 14.

The CHAIRMAN. Section 15.

Mr. CURRIER. Yes; section 15.

Mr. OGILVIE. Which portion of it, Mr. Currier, may I ask?

Mr. CURRIER. Beginning at the last word in line 13, on page 12:

Its omission by inadvertence from a particular copy or copies, though preventing recourse against an innocent infringer without notice, shall not invalidate the copyright nor prevent recovery for infringement against any person who after actual notification of the copyright begins an undertaking to infringe it.

Mr. OGILVIE. I am in absolute sympathy with that portion of the bill—unqualifiedly.

Mr. CURRIER. Now, what amendment do you suggest to that provision that will give you the further protection you say you need?

Mr. OGILVIE. I say that that particular section is all right in its intent and purpose, but where such a book as this is published under different titles, even then the copyright law should require that every copy should contain that notice, unless it was omitted by inadvertence; and irrespective of the place of publication every copy should contain that notice.

Mr. CURRIER. That is what you would suggest?

Mr. OGILVIE. Yes, sir.

Senator MALLORY. What would you do in the event that the provision of the law as you proposed to have it was ignored—forfeit the right?

Mr. OGILVIE. Yes, sir; decidedly so.

Senator MALLORY. Then the statute ought to say so.

Mr. OGILVIE. I think so, too. If it is done without inadvertence, the copyright should be forfeited—unqualifiedly so. It may be done for the purpose of making it public property. A man might have a book that he desired to have a very large circulation——

Mr. CHANEY. There is what the point would be. What words would you change there? It is the fifteenth section, is it not? What words would you change?

Mr. OGILVIE. I should say, not where he has sought to comply with it, but where he has complied with it, and the notice has been duly affixed to each copy of the edition published, that its omission by inadvertence from a particular copy or copies should not invalidate it. The scope is entirely too wide there. The bulk of the edition published might be the bulk of the first edition, and it might be a small edition, and the next one might be very large, and you would have no notice.

Mr. CURRIER. There is very little change there, then?

Mr. OGILVIE. Very little.

Mr. CURRIER. You simply propose leaving out where it had been “duly affixed to the bulk of the edition,” and providing that where it had been omitted by inadvertence from a particular copy or copies it should not be invalidated?

Mr. OGILVIE. I should prefer to have it read “duly affixed to each copy of all editions published.”

Mr. CURRIER. Then the words following would be absolutely inconsistent?

Mr. OGILVIE. Excepting—

Mr. CURRIER. Excepting where omitted from a particular copy or copies?

Mr. OGILVIE. Inadvertently.

Mr. CURRIER. By inadvertence.

Mr. CHANEY. Yes.

Mr. OGILVIE. And that the provision should carry with it the requirement for the insertion of the copyright notice in every copy published, wherever published—here, or in South Africa, or elsewhere.

Some gentlemen have suggested that the insertion of the American copyright notice in foreign editions of American copyright books was a hardship. I do not see that it is any particular hardship. There is a copy of "Coniston," Winston Churchill's last work, which contains a notice that it was printed in Great Britain—an English copy.

Mr. CURRIER. That contains notice of copyright?

Mr. OGILVIE. That contains the American notice of copyright.

Mr. BONYNGE. "Copyright, 1906, by the Macmillan company."

Mr. OGILVIE. Now, some gentlemen have suggested that the word "copyright" means that it might be copyrighted in Timbuktu or elsewhere. The only countries I know anything about (and I think I am familiar with some of them) do not require the same phraseology that the United States copyright law does. There can be no question on the part of any publisher who sees a copyright notice as to what country that book is copyrighted in.

Mr. CURRIER. Mr. Johnson, what hardship would it impose upon the publishers if you were required to attach the copyright notice to your editions wherever published?

Mr. JOHNSON. None whatever, except that it is impossible to control what is done on the other side.

Mr. CURRIER. Well, you have an English copyright. You also own the English copyright, do you not?

Mr. JOHNSON. The English copyright differs, as I understand, from ours. There is an entry at Stationers' Hall; the books are entered in Stationers' Hall.

Mr. CURRIER. Yes.

Mr. JOHNSON. But there is no such copyright notice as we place upon the book. I myself minimize Mr. Ogilvie's objection; I think it is one that could be easily overcome if it were important. But in the instance which he gives, it seems to me to be making a case for the law to afford opportunities for the easy republication of books which are thoroughly well known in this country. "Lovey Mary" sold to the extent of 300,000 copies in this country. It is reprinted in England. Nobody in this country has any idea that "Lovey Mary" is of English origin; and it ought to be in the public domain as far as copyright is concerned. Most books that are reprinted in foreign countries are reprinted because they are popular in this country. There may be some exceptions to that, and I think that all the publishers would feel inclined to take extra precaution to make sure that the copyright notice was affixed. I do not see any particular hardship about it; but I hope Mr. Ogilvie does not mean to say that there



was any intentional omission of the copyright notice. It simply is not the custom of the English publishers, and it takes them a little while, under our copyright exactions, to get accustomed to it—just as the French publishers, although they know that under our copyright law, by simply announcing the fact, a French book may be copyrighted here for one year, they do not do so, and they lose their copyright here. It is a matter of custom among the publishers which, after a little while, will be adjusted. I do not consider that there is any moral question involved in it.

Mr. OGILVIE. Mr. Johnson's statement that it is not the custom to insert the notice is subject to modification, as evidenced by the production of "Coniston" with that notice.

Mr. JOHNSON. I do not want—

Mr. OGILVIE. Pardon me, Mr. Johnson.

Mr. JOHNSON. I do not want to take Mr. Ogilvie's time—

Mr. OGILVIE. Well, I really wish you would not, because I have an engagement over at the Capitol in a few moments.

Mr. JOHNSON. Certainly.

Mr. CURRIER. Mr. Johnson did not break in except at my request.

Mr. OGILVIE. I beg pardon, but I have an appointment at noon, and I can not miss it. I do not want to be rude about it.

Mr. CURRIER. That is all right.

Mr. OGILVIE. That the requirement for the insertion of the notice is absolutely essential is evidenced in this particular instance when the courts have maintained the copyright on this book, for the reason that the contract between the publishers of this book in America and the publishers of the same book in Great Britain specifically provides that there shall be no liability attached to the American publisher for infringement of copyrights in Great Britain because of matter contained in this particular book, showing that it is the custom of every publisher in America, the Century Company or anyone else—they have done it along with others, Harper and everyone else—to take from noncopyright books—that is, books that are published without a copyright mark—certain material for use in the compilation of encyclopedias, dictionaries, or anything else of that sort. And it is essential for the protection of an American who publishes a book of that sort that the requirement should exist. It is perfectly fair to the owner of the copyright that his material should not be used, and it is equally fair to the man who has used some of it without knowing that he was doing it not to be held up. I have published, for instance, a large dictionary, an unabridged dictionary of the English language. We used in its preparation books from all over the world. We used none without permission that had American copyright notices in them, and those that did not have we used freely.

Mr. CURRIER. But, Mr. Ogilvie, may I ask just one question?

Mr. OGILVIE. Yes.

Mr. CURRIER. Suppose that the American proprietor of the copyright has not secured any rights in England, or somebody infringes over there, and they go to publishing, being protected by copyright here, in England, of course without attaching any notice?

Mr. OGILVIE. I am talking about authorized editions only.

Mr. CURRIER. What would you say then?

Mr. OGILVIE. He has got to take his chances; but why make him take any more chances than necessary?

Mr. CURRIER. But you would not think that you could appropriate that here?

Mr. OGILVIE. Why, certainly not. But why make him take any more chances than necessary? He has got to take enough. The pirates are not confined to America, by any manner of means. Great Britain is full of them, from Southampton to Lands End.

Mr. HINSHAW. Is it your notion that if a book copyrighted in this country is published abroad and imported here it can not be sold, or that its copyright may be void, may be forfeited here, by reason of the attempt to sell it in this country?

Mr. OGILVIE. No, sir. I say that an American copyright book can be printed abroad under the present law, and the Treasury Department has ruled that there is no prohibition of the importation of American copyright books that are printed abroad from plates made in this country. Now, then, if you take your plates abroad, and, because you print them abroad, leave out the American copyright notice, and bring your book into this country, are you entitled to a copyright? You have clearly violated the provisions of the statute; and yet the court upholds exactly that condition. I claim that it is essential that the language of this statute should be perfectly clear, for the reason that—I am reading now from a decision in a copyright case—"we do not believe that Congress intended to have their enactment interpreted to such an absurdity." Where they get an opportunity to be absurd themselves, they make Congress absurd; and it is absolutely necessary that there should be clearness of statement, and, if possible, avoid litigation, which this bill does not do. This bill as it stands to-day will be the greatest litigation producer in the way of copyrights that the country has ever seen.

I produce another book here—"Letters from a Son to his Self-made Father"—published in Great Britain, with an American copyright notice.

Another book—"Letters from a Self-made Merchant to his Son"—printed in Great Britain, without an American copyright notice; also the same book printed in this country with an American copyright notice.

I have here two books—"My Friend, the Chauffeur," by C. N. and A. M. Williamson, published in Great Britain, without any American copyright notice; also the Canadian edition of the same book, published in Canada, with a Canadian copyright notice and no American copyright notice. What is a man going to do? He does not know where he stands on the thing at all; he can not tell anything about it. Make the provision perfectly clear, and then let us live up to it.

The CHAIRMAN. Mr. Ogilvie, I think the committee thoroughly understands your proposition.

Mr. CURRIER. Mr. Ogilvie, I take it that you would be satisfied if this bill was amended to provide that the notice should be duly affixed to every copy of every authorized edition, wherever published, except when omitted by inadvertence from a particular copy or copies?

Mr. OGILVIE. Yes.

Mr. CURRIER. Then the bill, so far as you are concerned, would be satisfactory, would it not?

Mr. OGILVIE. Perfectly, with this provision: A copyright exists in this country in the name of Harper & Brothers, say. The English copyright belongs to John Smith. John Smith is the author of the book. He delegates to Harper & Brothers the right to copyright that book for him in this country and then prints that same book abroad, authorized, without a notice. The gentleman who said that it was impossible to cover those matters by contract tells you gentlemen that either because he thinks there is no publisher on this committee or because his lack of familiarity with making contracts with authors justifies him in making that remark. There is nothing in it.

Mr. CURRIER. With that modification, then, you have no objection?

Mr. OGILVIE. Yes, sir; but there should also be some provision covering the point that if the foreign author does not copyright that book in his own name in this country, but delegates the undertaking to some one else, all authorized editions, whether by the American owner of the copyright or the foreign owner of the copyright, should contain that notice.

Senator LATIMER. How will you enforce that statute with the foreign author?

Mr. OGILVIE. By providing that if the foreign author does not insert the notice in his book neither he nor any other individual shall come into the courts of this country and ask for the maintenance of a copyright that does not exist according to the statute. If it is an unauthorized edition, of course there is no way to cover it.

Now, gentlemen, that it is necessary to make this bill perfectly clear is evidenced by the fact that one of the Harpers made an affidavit a short time ago in a copyright suit that they had on to the effect that he did not know of the circulation and sale in this country or the publication (now, I want to be perfectly fair about it—it was one of the two, either the circulation and sale or the publication in this country) of Blackwood's Magazine.

Senator LATIMER. I understood you to state that if the author in Great Britain, for instance, of a book should give the right to copyright in America, it can still be printed in Great Britain under another name; and that if you undertake to publish that book here, even if the copyright is not in the book, then you have infringed?

Mr. OGILVIE. Yes, sir; the courts have so held.

Senator LATIMER. Now, what would you propose?

Mr. OGILVIE. I propose that irrespective of the title under which that book is copyrighted or printed, no matter by whom it is printed, if it is an authorized edition it should contain that notice of warning, unless you follow the English plan and leave out every notice. It is not material to me.

Gentlemen, I want to see a copyright bill passed that will protect every author in every right that he can possibly have. I own a great many copyrights myself, and I want to see them protected; but I do want to know what I am doing, so that I can not be held up.

Mr. CURRIER. Does not the modification I have suggested cover even the case you are talking about now?

Mr. OGILVIE. No, sir.

Mr. CURRIER. "Every authorized edition, wherever published?"

Mr. OGILVIE. But it does not say who owns the copyright. Now, a man can come into the courts of this country and say, "I own a certain copyright. I did not authorize the publication of it." They have already said that.

Mr. CURRIER. But will not the words "wherever published, or by whom," cover your ground?

Mr. OGILVIE. No; because he will say, "The authorization applies only to me." That is what they have said, and the courts have upheld them.

Mr. CURRIER. Will you formulate an amendment and file it?

Mr. CHANEY. Yes; formulate an amendment and file it.

Mr. OGILVIE. I object to doing that offhand, for the reason that I suggested an amendment—

Mr. CURRIER. Take your time. This bill is not going to be reported this week or next.

Mr. OGILVIE. I will formulate an amendment and send it to you. I hesitate about doing it now for the reason that I suggested an amendment some time ago, when I was here before, which, after consideration, I found was not sufficient to cover the point.

Mr. CURRIER. Take all the time you need.

The CHAIRMAN. How much time do you want?

Mr. OGILVIE. I have got to go very shortly.

The CHAIRMAN. I mean how much time do you want to file your amendment?

Mr. OGILVIE. Oh, I will do it within a week.

The CHAIRMAN. That will be all right.

Mr. CHANEY. That is good enough.

Mr. OGILVIE. Now, in regard to my statement that the English public objects to buying American books, or books with the American copyright notice, here is a contract, or a form of contract, prepared by Dean & Sons, of London, one of the conditions of which provides that back of the title page is to appear, in small type, "Entered at Stationers' Hall; all rights reserved; copyrighted and printed in U. S. A." leaving out the date and the name of the owner of the copyright; and that some of the American publishers have been foolish enough to do. I say "foolish enough" advisedly, because this is the "Foolish Dictionary." They did that. They left out the American copyright notice; and it has been done times without number.

There is another thing about the insertion of the notice in magazines. Judge Sanborn, of Wisconsin, recently made a decision in Chicago in which was contained this remarkably lucid statement:

If the notice of copyright is to be given in connection with each separate article published in a magazine, and not once for all contained in it, the language used to prescribe the duty of giving the notice is not well adapted to the object sought; for how is it possible to insert a notice on the title page, not of a periodical, but of an article? The latter may have a title, but hardly a title page, while the former has both.

The effect of that decision, if it were upheld, would be that if I publish a magazine—

Mr. CURRIER. What section are you referring to now?

Mr. OGILVIE. The insertion of the notice.

Mr. CURRIER. Oh, yes.

Mr. OGILVIE. The effect of this particular decision on that require-

ment is this: That if I publish the magazine and put the required notice on the back of my title page of the magazine, "Copyright, 1906, by George W. Ogilvie," and include in that magazine an article that was copyrighted in 1905 by John Smith, I can not legally put on the title-page of that article John Smith's copyright and have it a valid copyright. That is absolute foolishness, but that is the decision; and we are law governed, or judge governed, and not Congress governed, when it comes right down to the fine point. The enactment should be so perfectly clear that no judge should be able to twist it in that way.

Mr. SULLIVAN. Mr Chairman, I should like to ask the gentleman a question on this subject, as being vitally interested in the manufacturing clause of the law. I understood him to make the contention that in regard to an American copyrighted book, where the plates were made from type set within the United States, those same plates could be sent abroad to Canada or any other foreign port and an edition printed from them and allowed entry into the United States. Now, I understood that was the contention that he made; and I wish to ask him if that was the contention that he did make, and if he would feel warranted, as a publisher, in doing that, as I understood him to say?

Mr. OGILVIE. Yes; you understood me correctly, Mr. Sullivan.

Mr. SULLIVAN. In the case of an American copyrighted book, where the plates were made from type set within the borders of the United States, the plates could be sent over to Canada or to any other foreign port and an edition struck off from those same plates and imported in here, and they could not be prohibited entry?

Mr. OGILVIE. That is correct. The Treasury Department has so ruled.

Mr. SULLIVAN. I do not understand it that way.

Mr. OGILVIE. That is the Treasury Department's ruling.

Mr. SULLIVAN. If the gentleman, with the permission of the chair, will allow me to relate an incident, I think there is a representative from the Treasury Department here who will substantiate this statement. I would like to ask Mr. Ogilvie if he remembers the importation of a certain class of books into the port of San Francisco last year, imported from Japan, invoiced at  $7\frac{1}{2}$  cents a copy—a standard series of American schoolbooks, which are now in use in our public schools? Those were printed, supposedly, from plates made within the United States and from type set within the United States.

The contention was made, I believe, that the plates were stolen and sent abroad. That edition was printed in Japan. The level-headed collector at the port of San Francisco held the books up on account of the price at which they were invoiced. He knew that those books could not be put into the market at  $7\frac{1}{2}$  cents per copy—800 per cent cheaper than the American publisher puts them upon the market—and he held them up on that ground. But as he looked the books through he found that they contained notice of American copyright. Now, this is an exact case of where you say the plates can be made from type set within the United States in the case of a copyrighted book, sent over to Canada or any other foreign port, an edition struck off and imported in here, and the Treasury can not prohibit it. They did prohibit the importation of those books,

and, so far as I have been able to learn, the books were not allowed entry here, but were sent back.

I believe that Mr. Ogilvie agrees with the spirit of the law absolutely, which seems to me to be the letter of the law, that in order to secure American copyright the work must be performed in the United States. That is the way we understand it—the typographers. Speaking officially for an organization of 50,000 people and others interested in the printing industry, we understand it absolutely in that way. Perhaps we are in the dark. I would like to ask Mr. Ogilvie if he makes that contention?

Mr. OGILVIE. I should dislike very much to set myself in opposition to 50,000 people; but I have the authority of the Treasury Department for making that statement, Mr. Sullivan.

Mr. SULLIVAN. The law specifically states that in the case of an American copyright the manufacturing must be done in the United States.

Mr. OGILVIE. I beg your pardon.

Mr. SULLIVAN. If any part of that manufacturing in the case of those books is done in Japan, or in the case of a book where the plates were made in the United States from type set within the boundaries of the United States, if the plates were sent over to Canada, a part of the manufacturing was done outside of the jurisdiction of the United States.

Mr. OGILVIE. Mr. Sullivan, you are incorrect. The law does not say that the books shall be wholly made within the United States. It says they shall be printed from plates made from type set within the United States.

Mr. SULLIVAN. From plates made or from type set, or from plates made from type set?

Mr. OGILVIE. Yes, sir. Now, I say you can set your type in Niagara Falls, N. Y., and ship your type to Niagara Falls, Canada, and make a set of plates there and print your edition there and import it here, and the Treasury Department has ruled that you could do so, even if 50,000 people are of a contrary opinion.

Mr. SULLIVAN. I would like to ask, through the chair, an opinion from Mr. Montgomery, of the Treasury Department, on that point.

Mr. MONTGOMERY. That statement is not altogether correct. You can have your book printed abroad from plates made or from type set in the United States; but you can not set the type over there and make the plates over there.

Mr. OGILVIE. I did not say that you could. I said you could set the type in Niagara Falls, N. Y.

Mr. MONTGOMERY. The typesetting work must be done in the United States.

Mr. OGILVIE. That was my statement.

Mr. MONTGOMERY. We ruled—I wrote the letter myself—that the plates might be sent over there, and the books printed abroad, but that the typesetting and the plates must be made in the United States.

Mr. OGILVIE. That was exactly what I said.

Mr. SULLIVAN. Well, I go further than that. The point I wish to make is this: That as Mr. Ogilvie says, even where the plates are made and the type set in the United States, the manufacture or any

part of the manufacture of a book can not be done in Europe and an American copyright secured. That is our interpretation of the spirit of the law.

Mr. OGILVIE. Well, your interpretation is incorrect, Mr. Sullivan; and I will suggest this, if I may. I am not a member of a labor union. I do not know that I am altogether in sympathy with some of their desires, but I am with many of them; and I would suggest that you have incorporated into the proposed copyright law a provision making it necessary that because of the large market in the United States for foreign books no copyright should exist on any book the type for which was not set in the United States. That will help you out some.

Mr. SULLIVAN. We have tried, Mr. Chairman, to—

Mr. CURRIER. I hope, Mr. Sullivan, that if there is any doubt about that you will take up this matter as to whether you will have the law so modified that not only must it be from type set within the United States, but the book must be printed in the United States.

Mr. SULLIVAN. Yes; every part of the manufacturing.

The CHAIRMAN. Your fifteen minutes has expired, Mr. Ogilvie, although you have been much interrupted.

Mr. OGILVIE. I have been badly interrupted.

In regard to a contract with authors for the renewal of the copyright, the amendment that I suggested in June is impractical, for this reason: a concrete instance of it is this: Noah Webster's executor sold to the G. & C. Merriam Company the rights for an unexpired term of copyright in Webster's Dictionary. For it they paid \$3,000. They had it for the balance of the term of twenty-eight years. My suggestion was that if the publisher wanted protection he should be given the privilege of continuing the publication on the payment of the same royalty during the life of the extension that he had during the original term. My suggestion will not apply, for the reason that they bought that right from the executor of Noah Webster (and it might apply in hundreds of other cases), and they paid no royalty. Therefore the author, under those circumstances, or his widow or children would be unable to secure a copyright unless the publisher joined with them, and the publisher would not be obligated to pay any royalty at all.

Mr. CURRIER. No renewals are provided for in this bill, are they?

Mr. OGILVIE. Yes, sir.

Mr. CURRIER. In the case of a copyright of a book?

Mr. OGILVIE. Yes, sir; but the author's widow and children can only get a renewal if the publisher joins with them.

Mr. CURRIER. It gives a copyright for life and fifty years.

Mr. OGILVIE. The bill covers that point.

The REGISTER OF COPYRIGHTS. Section 19 deals with the extension of existing copyright.

Mr. CURRIER. Oh, yes—extension of existing copyright. I thought you spoke about future copyrights.

Mr. OGILVIE. Another point that I want to make is about the damage system. It is purely a one-sided proposition. This law will simply result in a legalized system of blackmail—nothing more or less. There is no provision here—

Mr. CURRIER. What law?

Mr. OGILVIE. The proposed law.

Mr. CURRIER. What section of it?

Mr. OGILVIE. The section in regard to damages. I regret very much, Mr. Currier, that my copy of the bill is lost. I thought I had it with me, but I have not.

Mr. CHANEY. It is the section relating to damages?

Mr. OGILVIE. The section relating to damages. There is no provision here whereby a man who has a perfect right to publish a foreign book can get one penny of damages from a man who deliberately holds him up without any just cause for it. That that is sometimes done under the present law is evidenced by the fact that the publishers of "The Simple Life," in New York, got after a publisher who translated a French edition of it and held him up until they could get their edition on the market. He had absolutely no recourse, and yet his business was injured.

There is no provision in here to take care of any man except the man who starts a suit.

Mr. CURRIER. Just formulate what you want.

Mr. OGILVIE. I will do that also in connection with the other matter.

Another thing—the liability of the printer—and this will interest Mr. Sullivan. There is no printer in the United States whom I can not get in trouble—serious trouble—so serious that it might put him out of business. I take to him a set of plates about which he knows nothing as to the existence of a copyright on them. He prints them for me. He can not know anything about it. He can not read everything that goes into his place; it is utterly impossible. He prints that book, and under the proposed law the infringement may continue for three years—two years as it is at present, but three years under the proposed law. The infringement may continue for three years lacking one day, and then the owners of the copyright can get after him and collect damages, either from the man who published the book, or, if he is irresponsible, from the printer who printed it, and he may get a judgment against him of such magnitude as to absolutely wipe him out of business. I think that is unjust. That portion of the law should be changed so as to read that if he wittingly, or after notice, prints a book on which there is an existing copyright he should be liable, but not before that. I am not a printer, but it occurred to me that that was perfectly fair.

Gentlemen, I have occupied so much of your time that I do not feel at liberty to go any further, although there are some other things I would like to talk upon; but I will not do it. I thank you for your indulgence.

The LIBRARIAN. Mr. Chairman, I understand from Mr. George Haven Putnam, representing the Publishers' Copyright League, that he would like to have an opportunity to use five minutes now.

The CHAIRMAN. Very well.

The LIBRARIAN. In connection with some of the suggestions of Mr. Ogilvie, as they affect the publishers.

#### STATEMENT OF GEORGE HAVEN PUTNAM, ESQ.

Mr. GEORGE HAVEN PUTNAM. Mr. Chairman and gentlemen, I do not expect, on behalf of the publishers, to take up your time with any general statement. We have no new matters to suggest for



your consideration, but are here to support the bill as drafted. We may ask the privilege from time to time, when different sections of the bill are considered, and particularly when they are considered by opponents of the bill or by opponents of copyright, to be heard on matters having to do with our own direct experience.

Mr. Ogilvie has made a contention on behalf of modifying the pending bill in such fashion that the requirement for the printing of copyright notice shall be made to extend not only to citizens of the United States doing their work within the United States, but to citizens of other countries doing their work in any part of the world. I do not believe, gentlemen, that you will give consideration, from the legal side of your responsibilities, to any such contention. I can not myself, speaking as a layman, understand how any American national legislature or State legislature can undertake to make laws which are to be enforced upon citizens not within the jurisdiction of a State or of the United States. Any attempt at such enforcement is, from a legal point of view, an absurdity and from the practical business point of view it is an impossibility. And it is an impossibility which, if attempted in the case of books, would bring serious injustice, serious loss, upon people who would be absolutely without any power to influence the course of business or the fulfillment of these impossible requirements—that is to say, the authors themselves.

The author makes a contract with a publisher for an important book the copyright of which is to be his property and, as he hopes, the property of his children. His American publisher makes a contract with a British publisher for a British edition, and possibly for subsidiary colonial editions of that book, or the British publisher himself makes subsidiary contracts for the printing of an edition in Melbourne and another in Cape Town, as well as arranging for the printing in London.

It is Mr. Ogilvie's contention that unless each one of those foreign editions carries this notice of American copyright the copyright shall run the risk of being forfeited altogether.

Now, I know from my own experience as a publisher, which extends over forty years and which has been connected with trans-Atlantic interests, the impossibility under any system of contracts of insuring a uniform recognition of the requirements of American law and of enforcing such requirements upon English publishers, and still less upon English printers. From time to time, even in the case of contracts with the most trustworthy of London houses, there would be an omission of that copyright entry. This risk would be greater in the case of books going to Australia. The farther away you got from the source of the original obligation the greater the risk, the greater the certainty, that it would be lost sight of. And an American author losing his copyright through somebody's breach has what redress? He has a right of action, possibly, for a breach of warranty against his American publisher. The American publisher, if he has such a contract, properly drawn, has a right of action in a British court against the British publisher, or the enforcement of the obligation or privilege or right of suit may be transferred from London to Melbourne.

What satisfaction is there to the American author whose copyright has been forfeited in the fact that his American publisher has

a right of action in London or in Melbourne—a right that would be very expensive and that would in fact be absolutely impracticable to enforce within any reasonable degree of expense—an expense that few copyrights would justify?

I do not admit the authority of the United States to legislate for citizens abroad. We can not persuade citizens abroad to incur or to accept the responsibility for penalties for nonfulfillment of laws to which they are not subject, and the penalty of the loss would fall upon the owners of the American copyright—the author and his copartner, the American publisher.

We see no requirement, sir, for any such provision. The provision that appears in the present bill is somewhat more explicit than that in the existing law, but since the existing statute came into force, in 1789, there has been no one case in which a person infringing an American copyright has been upheld in his infringement on the ground that he had printed from a foreign copy which did not contain notice of copyright. In fact, for any books which were worth piracy, the knowledge (as has already been suggested here by Mr. Johnson) that they were under American copyright, that they were property here, is a knowledge possessed by every intelligent publisher, and if he operated with that knowledge, he would be a willful appropriator, and he should be made to take the consequences.

In one case alone where there was knowledge of copyright and where suit was brought in the country against an infringement has that plea been raised by the defendant. The case was that of Rider Haggard's "She," and the suit was *Longmans v. The Minerva Publishing Company*, brought some twenty-one years back. The defendant, a New Jersey publisher and printer, produced in court a copy of that book printed in Melbourne, without the United States copyright notice, and he claimed that under the statute as it then stood (the same statute that now stands as far as that provision is concerned) he could not be held liable for infringement. The natural question asked was, How did he get that copy? That copy was not to be imported into the United States. Haggard was an English author, but he had secured copyright here. He held exactly the same position here that an American author would have held. This was a colonial book, printed in Melbourne, and the question was asked, "How did you get that copy?" "Well, I wrote to a friend in Melbourne, and he brought it in." That is to say, he had infringed one law, and on the ground that he had infringed one law he claimed the right to infringe another.

The importation of the dictionary printed in London, to which Mr. Ogilvie refers—and he has brought in here an argument in regard to a case in which he is now a defendant—the importation of that English print of that dictionary was in itself an illegality, and on the ground of one illegality the right is claimed to continue a further illegality which involves the loss of an American copyright property.

I do not think that you gentlemen will assent to any such contention. I judge that the laws that you will frame for us, the provisions for the better protection of literary property that you are going to secure for us under this amended bill, will extend over the territory controlled by the statutes of the United States and no farther; any attempt to make it extend farther would be most exceptional in the history of the world's copyright legislation. There

is no such attempt on the part of the copyright laws of any other country, and such a change in our own law would produce a manifold series of injustices and loss of property to people who would be absolutely without redress—namely, the American producers.

I will not take up time with the other details that Mr. Ogilvie has referred to, because they are of less importance and because my own experience is less direct concerning them.

Mr. CURRIER. Mr. Putnam, do you not understand that this provision, just as it stands in the bill now, would forfeit the copyright if the omission to put in the notice was intentional—if it was not omitted by inadvertence?

Mr. GEORGE HAVEN PUTNAM. I understand, sir, that the provision as it stands now makes requirement of that copyright entry only for books printed within this country. It does not attempt to make the requirement for authorized (nor, naturally, for unauthorized) editions of those books printed in any other country. The words are, "printed in the United States." I think you have the words before you.

Mr. CURRIER. Yes; you may give it that construction. It says, "to the bulk of the edition."

Mr. GEORGE HAVEN PUTNAM. That brings up another point, sir, which is quite a detailed point. It has happened—it happened with an important book of my own—that the printer in one case left out of one run of 500 copies of a book the entry of copyright.

Mr. CURRIER. What do you understand the "edition" means?

Mr. GEORGE HAVEN PUTNAM. Oh, sometimes it is 500 copies, and sometimes it is 5,000, sir. It should be "one printing."

Mr. CURRIER. You understand it means every edition?

Mr. GEORGE HAVEN PUTNAM. Every edition.

Mr. CURRIER. "Any edition" means "every edition?"

Mr. GEORGE HAVEN PUTNAM. "Any edition" means "every edition." But as the law is worded, sir, it means every book printed in this country. The language you have referred to is designed to protect the owner of the copyright from the possible loss of his copyright if, in some American edition, in some copy of that book, there has been an inadvertent omission of the copyright entry. I did not trouble you with that point, as it was not the point on which Mr. Ogilvie made his contention. It is a different point, but it is an important point, also, to the owner of the copyright.

Mr. WEBB. Mr. Putnam, if a book was copyrighted here and reprinted in another country from plates made here, and shipped back to this country and sold, do you not think it ought to contain a notice of American copyright?

Mr. GEORGE HAVEN PUTNAM. Assuredly, sir, if the book is brought in here for sale, if it is brought in here for publication. The term "publication" is quite a definite and distinct one. A book published here has an American entry showing that it is issued here; but I am rather in sympathy with the view of Mr. Sullivan, that the intention of the present law is that books protected by American copyright law shall be manufactured here. I am not myself, individually, in favor of a manufacturing clause. Mr. Sullivan knows that from discussion with me, but we have supported it because it expresses the present protective policy of the country; and I certainly understand that a consistent application of that clause means that books pro-

tected by American copyright shall be entirely manufactured in this country.

I will not delay you further.

The LIBRARIAN. Mr. Putnam, the chairman has intimated to me that it might be appropriate at this point to take up the importation clause which concerns the libraries, and upon which a number of gentlemen were heard at the last hearing. Before the librarians who appear here to protest against the clause as it stands say anything, is there anything that you would like to say on the affirmative side of the provision as it stands, in explanation of it or its practical effect?

Mr. GEORGE HAVEN PUTNAM. Would that be agreeable to the chairman?

The LIBRARIAN. I think it would be agreeable to the chairman and to the committee that you should be heard if you have anything to say now—just a word in explanation of the practical needs before the librarians point out their objections.

Mr. GEORGE HAVEN PUTNAM. If the chairman confirms the suggestion of the Librarian——

The LIBRARIAN. You can say it in a moment.

Mr. GEORGE HAVEN PUTNAM. The Librarian has suggested, Mr. Chairman, that as the discussion of the importation clause is to come up with certain objections the grounds for the clause as worded might affirmatively be presented by some of us.

The LIBRARIAN. You were not here in June.

Mr. GEORGE HAVEN PUTNAM. I was not here in June, but I have read the objections that were presented to that clause in June.

The CHAIRMAN. Will you not call the attention of the committee to the section to which you refer?

The LIBRARIAN. It is section 30. I think you might advantageously take up that matter now, Mr. Putnam. It would be useful, particularly the exception giving certain privileges to libraries in the importation of foreign editions of books copyrighted in the United States.

Mr. GEORGE HAVEN PUTNAM. The general purport of the larger provision, Mr. Chairman and gentlemen, is in leaving with the producer the complete control of the copyrighted article, to prohibit the importation into this country of other copies of the article so copyrighted. To that general prohibition (which is a necessary condition or part of the copyright control or property right that is given to the producer under the law) certain exceptions have been made under which importations are to be permitted. Those exceptions are mainly in line with the exceptions (that is to say, with the permissions for importation) given under the present statute, but they have, in certain subdivisions, been reworded.

I should explain that in the existing statute the provision having to do with the privilege of importation does not form part of the law which was discussed and considered for a term of five years. I had personally to do with those discussions, extending from 1886 to March 3, 1891. Up to 1891 the American author, the only author who could secure copyright, had the absolute control of his books within the territory of the United States. No copies of any edition not issued here, in the United States, under his authority, could be imported into this country excepting by the authority

of the author. That is in line with the copyright systems of all other countries. It is, according to our understanding, an essential condition of copyright.

There are, of course, various inconveniences in giving to an author the absolute control of his productions. He may be a fool; he may refuse to supply copies; he may put an exorbitant price upon them. He may throw his books into the streets, ruining other people to whom he may have sold copyrights, and so on. But our country has held, as other countries have held, that the manifest importance of inducing the production of literary, art, and musical property, the sense of justice in giving to the producer a proper return for that which he has produced, a return for his labor—that those considerations outweigh various possible and actual inconveniences in allowing him to control the thing so produced; and therefore the copyright laws of the world, and our own up to 1891, are in unison on that point.

In 1891, on the last day of the session, when the law had been put together in such shape as seemed to be fairly congruous and consistent, certain final interpolations were made—interpolations which, good, bad, or indifferent, had not been collated and could not be collated with the body of the law. Most of these last-minute interpolations were inconsistent, incongruous; and this one was particularly clumsy in its wording. It did not even, to my understanding, carry out the intention of those who framed it. It left free the importation of copyrighted books to libraries, incorporated or unincorporated; to institutions established for public or for private purposes; to associations of any kind; and to individuals. It did not even make any restriction as to whether the books so imported should be so-called authorized editions—that is to say, European editions which had been printed in Europe under arrangement with the author—or piracy editions.

It is a clause which you gentlemen will not accept as a precedent. It was hasty, bad legislation. We have been trying, in the sixteen years since, to get rid of it, to amend it, and to modify it. It has worked, it is working, increasing injustice to the producers of copyrights—the authors—and to their assigns, the publishers. It has been defended on various grounds; that there is a convenience to certain portions of the public, to individuals who have accounts in London, in importing books, whether or not these books have an American copyright; to libraries that have accounts abroad in importing books, whatever may be the American property control in those books. There are undoubtedly such conveniences. But these represent simply the convenience in having the privilege of appropriating the property of other people, irrespective of the interests and of the just requirements of these people. If a library, for instance, could get its building rent free, it could give out its books a good deal cheaper than it does. But you gentlemen will not give to library associations the eminent-domain privilege of confiscating buildings.

The status of the copyright is this: That when the author has produced a work and the law has given to him the copyright control of it, the author sells that copyright for the highest price that he can get—for one consideration or another—sometimes for a form of royalty, sometimes for an annual payment, sometimes for a fixed sum.

The theory is that the assignee purchasing that property has the same rights that you gentlemen have given under the law to the original producer. If those property rights on the part of the assignee are in any way impaired or undermined, sooner or later the price that he pays for the article will naturally be that much smaller. If he can not get a good title to his property, he will pay very much less for that property. The interests, therefore, of the authors and of the publishers are entirely at one in having the control clear and absolute.

Now, as a matter of fact, the most intelligent people in this country and the largest buyers of books are those who travel abroad and who carry accounts abroad; the largest buyers and distributors, viz, the libraries—four or five thousand of them—the people upon whom authors and publishers, to speak frankly, largely depend for their living have had this privilege and have exercised it, with increasing facilities for so doing more largely from year to year; so that large proportions of important American copyrighted books are sold here, not in the American copyrighted editions, but in editions produced abroad. And as far as the present law is concerned, these libraries and individuals can import and they do import editions produced abroad which did not pay anything to the author at all—piratical editions, so called.

The authors, through their business agents, the publishers, and the publishers for the account of the authors and for themselves, have protested against such an opening of the door. They say it is a great injustice to give copyright with the left hand and to take away a large proportion of it with the right hand. And we have argued with our friends, the librarians, about it; but as this thing has been going on now for sixteen years there has grown up a usage which has been a convenience, and we have tried to persuade the libraries to unite with us in a modification of this provision so as at least to lessen the injustice and the loss to American producers. We have been prepared, in consideration of the fact that this usage had gone on for a certain number of years, to assent to some suggestions from the librarians which would not stop a practice in which they had found a substantial convenience.

The librarians of the country were represented at the three conferences that were held during the year that this bill has been discussed, and of course everything they had to say on behalf of the great reading public was listened to with great attention. Those of us who were present arrived at a consensus of opinion—mainly, of course, between the authors and the publishers on the one hand and the librarians on the other—under which the provision in the existing law was shaped, and I was very sorry to learn (I was in Italy in June, at the time of the hearings here) that that matter had not been adjusted so that it could stay adjusted. You gentlemen did not want to be troubled with discussions. You expected to receive from us a bill expressing a consensus of opinion. We understood that such consensus of opinion had been reached. But I find that a large amount of time had to be given by you gentlemen in June to hearing objections to the clause as it stood. That clause as it stands takes away the privilege of individuals and leaves the privilege to libraries, not even with a limitation to incorporated libraries, but restricts the importation to one copy in each invoice instead of to two copies. A

library can get in from fifty-two to one hundred and four invoices a year, so that an institution requiring books from abroad can still, under this amended provision, secure full supplies of European editions of American books without the authority of the owner of the copyright.

That is not consistent copyright law. It is in itself not justice; but it is an adjustment which we accepted, and we hope very much, gentlemen, that you will not be persuaded to modify that adjustment. It is the single exception in the copyright laws of the world to the theory that nothing shall be done with a copyrighted book excepting with the permission of the owner. I may say, as a business detail, that there is never any difficulty in securing the permission of the author, through his representative, the publisher, for the importation of copies of foreign books in cases in which, on one ground or another, such importation may be found convenient or desirable, if the foreign edition is in some way superior or has any advantages that the American edition has not.

Up to 1891 that was the way the business was done. We imported from time to time the foreign editions of Irving's works or of Taylor's works for people who wanted them, and we simply saw to it that the owners of the copyrights secured their share of the price of those books, the share that they were entitled to. The people wanting English editions of Longfellow could get them. Houghton imported these, and the Longfellow heirs secured what they were entitled to secure.

The authors have a very direct business interest in the maintenance of the section as it stands, in checking the operations of this open door, which are undermining American copyright and which go to make American copyright almost a futility. The manufacturing interests also have a direct concern in the matter.

I contend that as there are certain inconveniences connected with that manufacturing clause which we publishers and authors have accepted because it is part of the present American policy, that clause should be made consistent. I contend that if a copyrighted book is to be produced from type set within the United States this restriction must be made consistent, and that each one of the 5,000 libraries and of the 80,000,000 of other buyers of books (of course in a reference to 80,000,000 buyers I am talking now *ad absurdum*) is under the same obligation to purchase that copyrighted book in the edition which has been produced in compliance with the requirements of the copyright law. Under the present statute any library and individual is free to import any copyrighted book in an edition which has not been manufactured in this country, as such library or such individual may see fit.

I say that is not consistency, gentlemen. If we are to have a manufacturing clause, let us have it consistently applied. It has its inconveniences; we accept them, but we do not want to have the inconveniences and then at the same time not be permitted to sell the edition for which we have bought the copyright and which has been manufactured by the associations represented here by Mr. Sullivan.

Mr. CURRIER. This also changes the law in this respect, does it not, Mr. Putnam, that hereafter nothing but an authorized edition can be brought in?

Mr. GEORGE HAVEN PUTNAM. Well, sir; under the law as it stands now no other than an authorized edition can be brought in excepting under this very provision that I have referred to.

Mr. CURRIER. I beg your pardon. It declares here, I think very clearly—I think it was said at the last hearing—that unauthorized editions printed abroad might be brought in, and that the custom-house authorities admitted them—that that was brought out.

Mr. GEORGE HAVEN PUTNAM. Well, sir, under that very exception in the law which I read the hasty interpolation of March 3, 1891, that is one of the things we complain of.

Mr. CURRIER. I had the impression at that time that it could not be done, but it very clearly appeared that it could.

Mr. GEORGE HAVEN PUTNAM. There is no specification as to the authority under which the edition is issued.

Mr. CURRIER. But you distinctly provide here, "published abroad with the authorization of the author or the owner of the copyright."

Mr. GEORGE HAVEN PUTNAM. Yes; the authorization of the author or copyright proprietor. That seems to us the true way.

Mr. HINSHAW. The existing statute has resulted in considerable diminution of the profits of the author by reason of these importations of foreign editions, has it not?

Mr. GEORGE HAVEN PUTNAM. And an increasing risk, certainly, of such diminutions. If I may give you one example: An American sells to Tauchnitz in Germany, say for 10 or 20 pounds (the prices paid are small), the right to publish a cheap edition of his book. He is willing to take 10 or 20 pounds for that right, assuming, of course, that the book so printed can be sold only on the other side of the Atlantic. He is doing that unwittingly, not understanding that he does not really possess copyright in this country, and he does not, under the law as it stands. Those Tauchnitz editions can be and have been imported by the libraries here and by individuals, and there is nothing to prevent their importation. Every book so sold stands in the way of the royalty that the author secures from his dollar and a quarter book or dollar and a half book here. He would never undertake to sell that right knowingly if he did not suppose that he had had the control of the American market.

The English author, on the other hand, is protected consistently. He sells to Tauchnitz the right for a German book for 10 pounds; but no Tauchnitz book can get into England. The English government has made a consistent application of what copyright means, giving to the author the control. If anybody wants to bring Tauchnitz books into England he can do so (I have done it myself) by getting the permission of the author, and that is the simple, logical application of the copyright law. But the American author in this respect is placed in an absurd position as compared with authors anywhere in the world by this interpolation here.

Mr. HINSHAW. And these cheap editions that come in here undersell the authorized editions?

Mr. GEORGE HAVEN PUTNAM. Sometimes they are cheap editions and sometimes they are not. Sometimes there are foreign editions which have one advantage or another and which ought to be imported when required, and which there is no difficulty in importing under this arrangement.



The LIBRARIAN. Does the Authors' Copyright League desire to say anything upon this issue in regard to the authors?

Mr. JOHNSON. I think, only later, in the course of our general statement, after the librarians have been heard, Mr. Chairman.

The LIBRARIAN. Mr. Chairman, I suggest that this would be a good time at which to hear some of the librarians.

The CHAIRMAN. We will hear them.

The LIBRARIAN. They are represented here, in the first place, by Mr. Bostwick, who was one of the representatives of the American Library Association at the conferences, and as such representative agreed to the provision as it stands. The libraries are represented also by certain librarians, including Mr. Cutter, who spoke in June last in opposition to the provision as it stands. Mr. Bostwick, have you anything to say in behalf of the American Library Association as a participant in the conferences?

**STATEMENT OF ARTHUR E. BOSTWICK, ESQ., OF THE NEW YORK PUBLIC LIBRARY, NEW YORK CITY.**

Mr. CHAIRMAN. Mr. Bostwick, you appear in favor of the bill as introduced in the Senate?

Mr. BOSTWICK. In favor of the bill as introduced in the Senate.

The CHAIRMAN. And do you represent the librarians in taking that position?

Mr. BOSTWICK. The American Library Association.

The CHAIRMAN. Are there other gentlemen representing that side here who desire to be heard in addition to yourself?

Mr. BOSTWICK. I am the only one of the official representatives of the American Library Association who is present at this hearing.

The CHAIRMAN. I understand there are a number of gentlemen representing libraries opposed to this provision.

Mr. BOSTWICK. There are. They have several representatives here.

The CHAIRMAN. Are we to understand that each one desires to be heard by the joint committee?

Mr. BOSTWICK. I can not speak for them; I can only speak for myself and for the other representatives.

The CHAIRMAN. You can take that matter up first.

Senator SMOOT. Are the ones opposed to this bill members of your association?

Mr. BOSTWICK. I think they are almost without exception. As appears in the proceedings of this joint committee at the hearing held last June, the then president of the American Library Association made a statement in which he said clearly that the librarians were divided on this question. I desire to say something as to the official relations of the American Library Association to the bill.

The CHAIRMAN. How much time do you wish?

Mr. BOSTWICK. Perhaps ten minutes. I have here a statement which has been signed by the other delegate to the conference and myself, which will put the matter perhaps in a little clearer light than it is now. I do not desire to read it, but if you will let me, I will put it into the record. It is signed by Mr. Hill and myself. I am very sorry that Mr. Hill could not be here at this time.

(By direction of the committee the paper above mentioned is incorporated into the record; and the same is as follows:)

DECEMBER 6, 1906.

STATEMENT OF THE DELEGATES OF THE AMERICAN LIBRARY ASSOCIATION TO THE  
RECENT COPYRIGHT CONGRESS OF THE RELATIONS OF THAT ASSOCIATION TO THE  
PENDING COPYRIGHT BILL.

We desire to submit the following statement of what we conceive to be the official position of the American Library Association in regard to the proposed bill. The undersigned were delegates of the American Library Association to the copyright conference and are now a committee of that association to watch the progress of the bill and to do what may appear to be necessary for the interests of the association in connection therewith.

At the first meeting of the conference, June 2, 1905, the delegates protested against the proposed exclusion of foreign editions of works copyrighted in this country, and stated that, although no formal action has been taken by the association, the matter would be considered by it at its meeting in Portland, Oreg. In reporting this action at that meeting, July 7, 1905, the delegates recommended that the question be referred to the council for consideration and action. Accordingly the council requested the executive board "to take measures for the representation of the association at future conferences on the revision of the copyright laws, and in behalf of the association to protest against the inclusion in the copyright law of the provision prohibiting importation of copyrighted works into the United States without written consent of author or copyright proprietor, or to secure some modification of the same."

The delegates, having been reappointed, attending the two remaining sessions of the conference, November 1-4, 1905, and March 13-15, 1906, and in the interval had an informal meeting with the representatives of the American Publishers' Copyright League, at which the latter signified their willingness to modify in great measure their demands for the exclusion of foreign editions. Being convinced that the draft of a copyright bill as agreed on by the conference would inevitably contain a clause lessening the present privileges of libraries in the importation of American copyright books, and desirous, in accordance with their instructions quoted above, to secure as great a modification of such restriction as seemed possible, the delegates agreed to accept a clause which differs in no important respect from that now embodied in the bill under discussion. This clause was not finally put into shape until after extensive correspondence and a conference of the executive board with the representatives of the American Publishers' Copyright League, at which the delegates were present. The resulting compromise, which received the unanimous approval and concurrence of the executive board, was presented to the council of the association at its meeting in Atlantic City, N. J., March 10, 1906. At that meeting some members of the council expressed disapproval of the action of the delegates and the executive board, and a number of motions were introduced looking toward specific instruction to the delegates, but no definite action resulted from any of them.

At the close of the sessions and after the last hearing given by the Senate and House committees, beginning June 6, 1906, the delegates again reported to the council at its meeting at Narragansett Pier, July 5, 1906, explaining in full the various steps that had been taken and giving their reasons for the same. The council voted that their report be accepted and their recommendations adopted "and that the thanks of the council be extended to the delegates for their successful efforts."

The undersigned were appointed as a committee to watch the progress of the bill, as stated above, and a resolution introduced to give them specific instructions was voted down by a large majority.

Under these circumstances the undersigned regard their action as beyond doubt the official action of the American Library Association. The Association by every means open to it has approved as a body the part of the present bill affecting the interests of libraries, and any expression of disapproval must be that of individual libraries or librarians and not of the association as a whole.

Very truly yours,

FRANK P. HILL,  
ARTHUR E. BOSTWICK,  
*Committee of the American Library Association.*

Mr. BOSTWICK. At the time when this conference was formed the American Library Association was requested to send delegates to it. All the members of the association and also the delegates recognize that the provisions of law as they stand were extremely favorable to us, and we had the option of staying out of this conference and of insuring that a bill would be introduced which would be detrimental to our interests, and relying on that fact, so that we might have the best chance possible to kill the bill by protesting. Or the American Library Association had the option of going into the conference and of then, in the conference, trying to arrive at the best terms that we could with opposing interests and then trying to put the bill through in that shape.

The American Library Association chose the alternative of sending delegates to the conference and of instructing them to protest against the rather drastic provision which the publishers and authors then proposed to put into the bill—of absolutely prohibiting all importation of American copyright editions either by libraries or by individuals or of endeavoring to secure some modification of this provision. We did so protest, and we were very successful, as we feel, by conferences with the publishers and authors, in securing the modification which is embodied in the present bill.

The principal meeting at which that modification was secured was a meeting of the executive board of the American Library Association, with a large number of persons interested, among whom were some of the librarians who are now protesting against the bill. It was supposed at the conclusion of that meeting that a very large majority of the librarians were in favor of the compromise as embodied in the present bill. It now appears that there was a very large number of individual libraries and individual librarians that are not satisfied, and that protest against it. But the representatives of those librarians have never succeeded in passing through the executive board of the association or the council of the association any instructions to the delegates, Mr. Hill and myself, to act otherwise than we have acted. And we feel, as stated in the document which I have just submitted, that our action in securing this compromise has the approval of the association, and that it may be taken as the official voice of the American Library Association.

After making this clear to the committee I think it is not necessary for me to speak at any length, or to speak at all regarding the merits of the bill. Of course the participants in the compromise always recognize that the compromise is not what they would prefer. They always have to give in a little. But we feel in this instance that the librarians have given in a very short distance, and that the distance that the publishers and authors have come to meet us is very much greater than the distance we have gone to meet them. And I feel personally that there is nothing in this bill that the American Library Association could legitimately object to; and it stands, in my understanding, as the official voice of that association.

The LIBRARIAN. Of the gentlemen in opposition to this provision, Mr. Chairman, I note the presence of three—Mr. Cutter, of Northampton, Doctor Steiner, of Baltimore, and Mr. Wellman, of Springfield. Have you arranged, gentlemen, which shall address the committee first?

(It was indicated that Mr. Steiner would speak first.)

**STATEMENT OF BERNARD C. STEINER, ESQ., LIBRARIAN OF THE  
ENOCH PRATT LIBRARY, BALTIMORE, MD.**

The CHAIRMAN. Do I understand that you appear for all the gentlemen who are here representing the opposition to this provision of the bill?

Mr. STEINER. Mr. Cutter and Mr. Wellman would like a few minutes after I have spoken, sir. We would like to divide the time.

The CHAIRMAN. How much do you wish?

Mr. STEINER. We would like to have an hour between us.

The CHAIRMAN. It does not seem to us, Mr. Steiner, that it is at all necessary for you to have an hour.

Mr. STEINER. Mr. Chairman, we of course can take less time; but this is a new organization that has taken its origin since the last hearing, and has had no opportunity to appear before.

Mr. CURRIER. Mr. Cutter was very fully heard at the last hearing.

Mr. STEINER. Yes; that is perfectly true; but the arguments which will be made by me are not the arguments that were made at the last hearing.

The CHAIRMAN. Well, you are here to present those arguments.

Mr. STEINER. After that Mr. Wellman would like to appear; he has not had a chance to be heard; and Mr. Cutter would like to present some observations from another point of view. I think, gentlemen, that you will find that the hour may well be spent.

The CHAIRMAN (after consultation). The committee has decided to give you ten minutes apiece.

Mr. STEINER. Gentlemen, first I desire to file with the committee the following protest, signed by the librarian of every important library in the United States, with only two or three exceptions:

We the undersigned members of the American Library Association protest against any alteration of the existing law that will impose restrictions upon the importation for libraries of any books except pirated editions.

There are over 200 signatures to that, over 150 of them the librarians of important libraries in this country, including nearly every important library.

Senator SMOOT. Then we are to understand that the executive committee does not represent the sentiment of the libraries of the United States. Is that it?

Mr. STEINER. Personally I should say you certainly may so understand.

Senator LATIMER. Why do you not control their action, then? Can you not do it?

Mr. STEINER. May I leave that to the other persons who will speak?

I propose, sir, two amendments to the bill, which I will make very definite, and then will support them in a few words. That on page 24 of the Senate bill, line 19, the word "one" be stricken out and the word "two" be inserted in lieu thereof; and that beginning with the word "but," in line 25, at page 24 of the same bill, all the words be stricken out down to the close of the third paragraph.

I propose, sir, the first amendment because it frequently happens that it is extremely desirable for a public library to import two copies of a book in one invoice. It is extremely desirable frequently to have one copy for reference and another for circulation.

Mr. CURRIER. It would be more desirable still to import half a dozen, would it not?

Mr. STEINER. No, sir; two would be plenty. It is also very desirable, and in my own experience I have frequently had occasion to import two copies of books for replacement. I do not believe that there has been brought before you the importance of the importation of books for replacement. In our library we replaced last year 2,700 volumes which had worn out.

The public library is a part of the public educational institutions of the country. It is an institution for the public culture. It is supported by the public. It is given special privileges by the public. It is a tax-supported institution. It is a branch of the municipal government in many cases. In my own library the title to the buildings and the books and all the property we have vests in the mayor and city council of Baltimore. Therefore the Government quite properly gave special privileges to the public library, and among those special privileges was the privilege of importing two copies for use, and not for sale, of all books which are published in any part of the world.

Now, with regard to the prohibition of the importation of foreign books by American authors, copyrighted in the United States of America, we object to that.

In the first place, we object to any provision which will prevent the public, with the money raised from the taxpayers, having the best possible means for the education of the people. It is very difficult, indeed, to find, furthermore, when an English edition of a book or an American edition of a book are going to be published. An English edition may be published sixty days before the publication in the United States. Simultaneous publication in the two countries is not required. A book may be published under one title in one country and under another in another. It is impossible to predict that a book will be issued by an American publisher until after he has announced it. I have bought books by American authors in English editions of which there were no American editions. I have bought other books published by American authors in England, and after I have bought them I have found later that there was an edition in America. The publication of a book in serial form is not sufficient to secure copyright. I have bought a book of an American author in the fall of one year, and the book was not published in book form in America until the spring of the next year. Is the public library to be deprived of the books during that time? Is the public library to be in the hopeless condition of being unable to find out whether there is going to be an American edition or not?

In the second place, gentlemen, what is an American author? Is an American author a citizen of the United States? Is he a person domiciled in the United States? Was Rudyard Kipling an American author when he was domiciled in Vermont? Is Walter Phelps Dodge an American author who is domiciled in England? William Waldorf Astor, I have no doubt, was once an American author. I assume that he is not now an American author. Have we to keep watch of the naturalization records in the courts to be sure who are American authors?

This is not only true, gentlemen, with reference to books printed in

the English language. One of the largest Yiddish centers of publication in the world is New York City. German books are printed in New York and Chicago. The largest Lithuanian publishing house in the world is in Plymouth, Pa. It is impossible to determine who an American author is, either from his name or from the character of the book which he prints; and the biographical dictionaries unfortunately do not give us information concerning the gentlemen who write books.

Again, it is frequently difficult to tell whether a book is copyrighted in this country. This would require libraries to enter into correspondence with the Copyright Office before we ordered books. The books printed in foreign countries, as has already been called to your attention, do not contain such notice. We are convinced that the customs officials of the port of entry are incapable of ascertaining the fact, not because of the lack of their intelligence, but because of the enormous complexity of the situation. Millions of articles have not been copyrighted both in the United States and in Europe. The inclusion of one doubtful book in a copyright invoice may cause that invoice to be held up for weeks and months and the people of the city to be deprived of the use of the book in that interim. And do you gentlemen realize that the public library is regarded as such an important institution in the State of New Hampshire that every town is required to have a public library unless, by a vote taken year by year, it decides not to have one; and that in the public libraries of the country every man, woman, and child in the towns where they are established of the persons who can read and write form a proportion of from one-fourth to one-tenth of the readers of the public library possessing borrowers' cards? Are we prepared to deprive such a proportion of the population of the use of the books?

Mr. CURRIER. How many libraries in the State of New Hampshire do you suppose ever took advantage of this provision and ordered books?

Mr. STEINER. I do not know, sir. I am not a citizen of the State of New Hampshire. I simply know that it is regarded as a very important public interest.

Mr. CURRIER. I am a citizen of that State, and I should imagine that none of them but the State library has done so—the one institution.

Mr. STEINER. Furthermore, to secure the consent of the American copyright proprietor, except in rare cases, is out of the question. In the first place, he may decline to consent. In the second place, it is often impossible to get into communication with him. The bill does not say the author, but the American copyright proprietor. And, finally, the labor and expense involved in getting his consent would be so great that it would be impracticable so to do. Assignments of copyright must be registered in the Library of Congress. I find no rule that the address of the person who is the owner shall be registered there. Furthermore, suppose a man dies who owns a copyright. The copyright forms a part of his estate. Can his executor give that consent? Can we find his personal representative? Who are his legatees? Who owns that copyright? Is it possible for them to give the consent?

Again, as disbursers of public funds provided by taxation we object to any provision which would limit our source of supply of books.

Again, the English edition is often a different one, and better, for certain reasons, for library purposes than the one published in the United States. Books have been published in England with more plates, with more appendices, on heavier paper, with better binding than the American edition. Is the American public to be deprived of the use of these editions through the public libraries?

Again, there is no obligation on the American publisher or copyright proprietor to keep in print any decent edition of any book, and there are books of which there is no decent edition in the United States. There are books on which a copyright still runs which you can only get in 10 or 20 cent paper-covered editions in the United States, and of which you can secure editions on good paper, with good type and durable binding, in England. And there are books by authors in the English language which can not be procured either in England or America, and yet are copyrighted books and can be procured in Germany. Are we to be deprived of securing these books at all because of the fact that the American copyright proprietor does not care to publish a decent edition?

Again, gentlemen—I am speaking very rapidly in order to cover these points in the ten minutes—the privilege given the American publisher or copyright proprietor as to supplying copies of his edition is too vague. You write to him for a book. He says it is out of print. The copyright still binds, you notice. You ask him, “When will you reprint it?” “Well, I think I will reprint it soon.” He does not reprint it. You can not import the American edition for the public libraries. The people are not allowed to have that book. This is mostly in case of the replacements of which I was speaking, and a replacement, if any book, is a book that ought to be upon the shelves. You can wait a little while with new editions; you can hold people back for a few days and say, “We have not got the book yet.” But if a man comes to our library and says, “On your catalogue is this book,” it is our duty to give it to him, and there is no excuse he will take. He will not take as an excuse the statement, “Why, that book is worn out, and I have not been able to buy another copy.” And that is just the book which the American copyright proprietor can prevent you from obtaining for any number of months while he is making up his mind whether it will pay him to reprint it, simply because he is the copyright proprietor.

As it is now, we go to them and ask them if they have a certain book. If they say it is out of print and that they are not going to reprint it right away, we get an English edition. If they say it is in print, we get the American edition, if it is a good one. No library buys abroad if there is a good American edition that can be obtained at the same price and of the same quality, because we do not want to lose the time. It takes from two weeks to two months to get a book from a foreign country, and we want to put the book on the shelves and serve the public as soon as we can. And then there is another thing: The books which are copyrighted in the United States and are printed abroad in ninety-nine cases out of one hundred are books which are copyrighted on both sides of the water, and it makes no difference to the author in any case.

Gentlemen, I am speaking in behalf of the public library, which, as I said, is a part of the municipal government of almost all of our cities in the country. This is a provision which will practically, if passed as it is now, make it impossible for a public library to import books, because of the difficulty of understanding and ascertaining what books are written by American authors and of obtaining the consent of the American copyright proprietor. I have prepared, or rather the Copyright League has prepared, a brief statement of these objections in print; and I would like to file copies and leave them with the members of the committee.

(A number of the printed copies above mentioned were distributed among the members of the committee.)

Mr. WEBB. You can get two books by making two different orders, can you not? You can get twenty books if you want to, if you just make different orders for them?

Mr. STEINER. The only difference is, as I have said, that it is an inconvenience which seems to me unnecessary in these two cases—and these are the only two cases where I can conceive of the wanting of more than one copy. These two cases come in right along. A book will come out in England of which one copy will be wanted to keep in the reference collection and another copy to keep in circulation; or a book will come out and be allowed to get out of print in this country, and you will want two copies for replacement, and it is necessary to wait for another invoice. It is simply an inconvenience, without any advantage to the publisher on this side.

I can assure you, gentlemen, that other things being equal, nobody imports an English book. It is only when either the English book is much better in its physical characteristics or the American publisher is extortionate in the price he puts on the book that we get a book from abroad.

Mr. HINSHAW. This would mainly affect the large libraries, would it?

Mr. STEINER. It would affect large and small libraries. It is surprising how many libraries import books through the mail, and in very small invoices, because importation through the mails is a very common thing. We all get library books through the mails, as well as in the larger invoices, and the number of libraries in the country that are importing books by mail is quite large. It is impossible, of course, to tell how many there are.

#### LIBRARY COPYRIGHT LEAGUE.

[Bernard C. Steiner, president, Enoch Pratt Free Library, Baltimore, Md.; W. P. Cutter, secretary, Forbes Library, Northampton, Mass.]

"The purpose shall be to prevent copyright legislation abridging the existing rights of libraries to import authorized editions of books."—(Article II, Constitution.)

SIR: The Library Copyright League has duly authorized its executive committee to present to you the following arguments against certain provisions of Senate bill 6330, entitled "A bill to amend and consolidate the acts representing copyright."

The signatures on the accompanying protest comprise 220 persons prominent in library work, 120 of these persons being chief librarians. A list of the libraries represented is appended.

The Library Copyright League is opposed to certain provisions of section 30 of said bill, believing that any bill which includes these provisions would be a distinct detriment to the educational interests of the country, and as such



an undesirable piece of legislation. The provisions of which we complain tend seriously to impair the freedom of public libraries to supply the public with good literature; the interests of the public library are of vital importance to all, as the libraries exist for the benefit of all the people.

The present provisions of law under which libraries import books restrict only the number that may be imported in any one invoice, limiting it to two copies.

The proposed legislation further limits the privileges of importation in the following respects:

I. It limits the number to be imported in any one invoice to one copy. This provision is objectionable, first, because it is sometimes desirable to have two copies of a newly issued book, one for reference and one for circulation; and secondly, because it is frequently desirable to procure in one invoice two copies of books bought in replacement of worn-out volumes.

II. It limits the importation to authorized editions, excluding so-called "pirated editions." The league has no objection to this limitation, except as it may delay the entry of other books contained in the same importing package.

III. It prohibits the importation of foreign editions of books by American authors copyrighted in the United States of America. This provision is objectionable for the following reasons:

1. We object to any provision which will interfere with the free public dissemination of the thought of the world to the citizens of our country through the public library system or will cause any delay in placing this printed thought before our readers. English editions of the works of American authors may, according to those provisions of the bill contained in section 16, be published abroad sixty days before the publication in the United States. Further, simultaneous announcement in America and in foreign countries is not required. Works are frequently announced in England weeks or months before they are announced in the United States. It is impossible to predict that a book will be issued by an American publisher until after he has announced it. This provision would therefore delay the ordering of any book from England until sixty days after it is published in that country, and if the book be not published in the United States a further delay will occur before the book can be procured from England. When a work is published as a serial in a magazine, the copyright of the work in such form preserves the rights of publisher and author, and enables them to postpone issue of the work in volume form to such time as suits their convenience. Thus, a serial story appearing in magazines on both sides of the ocean has been published in book form in England in October and in America in the end of the following March. If the American publisher had never cared to issue the book in volume form in the United States, and the law be passed as now drawn, it would be practically impossible for the library to procure such a book.

2. It is in many cases extremely difficult to determine whether the author of a book is an American or not. The determination of this fact would require an enormous amount of labor both by the librarian of a library and the officials of the custom-house at the port of entry, and resultant delay in obtaining the books for circulation. In some cases, as in those of new or little-known authors, there are no possible means for a librarian to ascertain whether an author be American or not. There is no definition of the phrase "American author" in the bill, and the subject is greatly complicated, inasmuch as some American authors publish books in England of which there are no American editions, as some Americans are domiciled abroad and as others have changed their citizenship and have become naturalized in foreign countries.

3. It will be difficult to determine whether a book is copyrighted in this country. This would require libraries to determine, by correspondence with the Copyright Office, the existence of a copyright in advance of ordering. No English exporter can determine the fact, as English publishers object to the printing of an American copyright notice on their editions and the proposed law makes no provision for such printing. We are convinced that the customs officials at any port of entry would be incapable of determining the fact, and that therefore the proposed provision would either result in enormous additional work on the part of these officials, greatly increased expenses, and exasperating delay, or would render the law incapable of enforcement. In

any event, it would result in serious delay in obtaining the books for circulation. The inclusion of one doubtful book in a case would undoubtedly result in the retention of the whole case in the custom-house until the question with reference to this book was settled.

4. To secure the consent of the American copyright proprietor, except in rare cases, is out of the question; for in the first place, such proprietor may decline to consent; in the second place, it would often be impossible to get into communication with him; and finally, the labor and expense involved in seeking such consent would often be excessive, and would always be so great as to render frequent seeking of such consent prohibitory upon any library. While assignments of copyright must be registered in the Library of Congress, the changes in the address of the proprietor need not be registered there. In the case of a copyright forming a portion of the estates of deceased persons, extreme difficulty or insuperable obstacles would often prevent libraries from obtaining the consent of the executors, administrators, personal representatives, or legatees of such deceased persons.

5. As disbursers of public funds provided by taxation for the education of the people, we object to any provision which would limit our source of supply of books to the members of any such organization as the American Publishers' Association, whose policy has been to control the price of books by limiting the distribution to such retailers as would agree to maintain advanced prices and refusing to supply goods to those who will not so agree. Such limitation of our market is in effect a tax on a public educational institution, to be paid directly to the book trade of this country, and would make it possible for the publishers to fix the prices of books at any figure, and hence to tax us in any amount. We respectfully call your attention to a monthly publication known as the "Book and News Dealer," in which is printed, in each number, a list of those dealers whose supplies have been stopped. This publication is the official organ of the American Booksellers' Association, as appears on the front cover of the publication. The agreement between the American Publishers' Association and the American Booksellers' Association to control prices has been pronounced illegal, as a violation of the Sherman antitrust law (26 Stat. L., 209), by a decision by the circuit court for the southern district of New York in the case of *Bobbs-Merrill Co. v. Strauss*. (Fed. Rep. 139, p. 155.)

6. The English edition is often a better one for library purposes than that published in the United States, or is different from that published in the United States in certain respects, as, for example, in character of paper or illustrations, addition of appendixes, etc. It is always desirable to obtain the completest and most durable edition for the use of the public who are the patrons of the public library.

7. There is no obligation upon the American publisher or copyright proprietor to keep in print any decent edition of a work. Public libraries are continually wearing out books and are forced to replace them. In procuring these replacements it is frequently found that certain books are issued in the United States only on poor paper with worn plates and in paper covers, while there is a neat, durable, and well-bound edition published in England. Libraries should be permitted freely to procure the best editions in these cases, wherever it may be printed.

8. The privilege given the American publisher or copyright proprietor as to supplying copies of his edition is too vague. If he should state that the book is out of print to-day, but will very shortly be reprinted, the public library should not be obliged to wait upon his pleasure, and thus the people be deprived of the use of the book for a time, whether any guaranty that the publisher may not change his mind and fail to reprint the book.

9. The Constitution of the United States (Article I, section 8) gives Congress the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The proposed copyright bill purports to be drawn with this object. But under existing law authors have a right to all the protection that is necessary. They have a right to copyright in other countries under the act of 1891. They sell this copyright, either for cash or royalty, in England as in America. Once that an agreement is made they can not care whether a book is sold there or here.

We are confident that you will, after careful consideration, amend the bill in such a way as will retain for the libraries of this country the privileges which previous legislation has given them. The Library Copyright League, therefore,

asks that there be omitted from the bill in the report of the committees the words after the words "United States," in line 25, page 24 of the Senate print of the bill No. 6330, through and including the word "proprietor," in line 5, page 25, and that on line 19 of page 24 the word "one" be stricken out and the word "two" be inserted in lieu thereof.

BERNARD C. STEINER,

*President,*

W. P. CUTTER,

*Secretary,*

H. C. WELLMAN,

*Librarian City Library, Springfield, Mass.,*

E. H. ANDERSON,

*Director State Library, Albany, N. Y.,*

FREDERICK H. HILD,

*Librarian Public Library, Chicago, Ill.,*

*Executive Committee, Library Copyright League.*

**STATEMENT OF H. C. WELLMAN, ESQ., OF THE PUBLIC LIBRARY,  
SPRINGFIELD, MASS.**

Mr. WELLMAN. Mr. Chairman and gentlemen, I am vitally interested in this bill, and I have come all the way from Springfield to speak on it. I am very anxious to take it up, not only from the point of view of the librarian, but from the point of view of the general public, which has been, so far as I can see, very generally neglected. I want to take up together the two subjects if I can; because the general public's interest and the library's interest are closely related. I can not do it if you will allow me only ten minutes. If you will give me fifteen, or possibly twenty, I think I can.

Mr. MCGAVIN. To what particular section do you direct your remarks now?

Mr. WELLMAN. I want to speak of section 1, subsection B, relating to the right to sell and distribute copyright books.

Mr. CURRIER. That is going to be taken up by Mr. Porterfield and other lawyers later on.

Mr. WELLMAN. It has a direct bearing on the libraries.

Mr. CURRIER. There is no intention at all on the part of the committee or any other human being to restrict the sale or to prevent the absolute title passing on the sale; neither here nor anywhere else is there any such intention.

The LIBRARIAN. It is certainly not the intention of those who drafted the bill, Mr. Chairman, and it may save some time to those who are to speak on the bill if that is clearly understood at the outset.

Mr. CURRIER. There is no intention to do that, and if any gentleman has any desire to correct the phraseology of that language, let him just formulate an amendment which meets his ideas.

Mr. WELLMAN. If that is not to be passed in that form, that is another thing. I simply had the face of the bill to go by, and in that event I should omit that.

The LIBRARIAN. This is Mr. Fuller's own statement about it:

"As to the pretense," he puts it, "of any prohibitive or limiting clause in the bill that would interfere with the selling or giving away of copyright books, or anything but the reproduction or republication by printing or public performance," he says, "it can not be patiently dealt with." I quote that only to show that the committee

had no idea that the word would be susceptible of the application that has been suggested.

Mr. CURRIER. I merely make the suggestion, because no one need argue that before the committee.

Mr. WELLMAN. Then I can omit that, sir. I wanted to speak of the duration of copyrights, which relate to libraries as well as to the public; of the omission of the date in the notice of the copyright; and particularly of the importation clauses, both as regards the individual and as regards the libraries.

Mr. MCGAVIN. What sections of the bill are those?

Mr. WELLMAN. Section 18, subsection C; section 14, and section 30, subsection E.

The LIBRARIAN. It would be well to deal with the importation first, although not in order, Mr. Wellman.

The CHAIRMAN. Mr. Wellman, are you a practicing lawyer?

Mr. WELLMAN. I am librarian of the city library in Springfield. I have no legal knowledge.

The CHAIRMAN. Some of the questions which you suggest involve legal questions, do they not?

Mr. WELLMAN. Possibly.

The CHAIRMAN. Let me suggest that to-morrow morning we expect to have Mr. Porterfield and also Mr. Steuart present just the questions which you are now suggesting; and let me suggest that you confine what you have to say now to the question of the libraries pure and simple, and then, if you are here to-morrow morning and listen to those gentlemen, perhaps you will not desire to discuss those questions.

Mr. WELLMAN. Very well, sir. Then I will take up the question of the importing.

The CHAIRMAN. I wish you to understand that we desire you to discuss the question of importation by the libraries.

Mr. WELLMAN. I shall be glad to do that.

The CHAIRMAN. And in the discussion of that question we think that ten minutes is ample.

Mr. WELLMAN. I should like, then, to answer the question of the gentleman who said "Why did we not control the action of the executive committee of the American Library Association?" I should like to say, in the first place, that the delegates of the American Library Association were at first appointed informally, the appointments being afterwards confirmed by the association after the delegates had been at the conference. I should like to say that the delegates do not represent the overwhelming sentiment of the association, as Doctor Steiner showed you.

You ask why we could not control them. There are various reasons. In the first place, you know how difficult it is in an association that includes a membership from Canada to the South and from the East to the West, to manage an association which is in the hands of an executive board. This is an executive board of five. One member was the delegate who is here, the president of the association. Another member is secretary or recorder, and is connected with various publishing interests. The executive board acted previous to the action of the council of the American Library Association. I attended the first meeting of the council of the American

prietor of the copyright to get something more for his book than he would get if he did not have any copyright.

Mr. WELLMAN. And he secures that whether the book is brought from abroad or not, if it is an authorized edition.

Mr. CURRIER. Exactly.

Senator SMOOT. You say the proprietor of the copyright sells to the libraries cheaper than he will to the public?

Mr. WELLMAN. The English proprietor?

Senator SMOOT. No, no; the American proprietor.

Mr. WELLMAN. The American proprietor sells for 10 per cent less on ordinary net-price books.

Senator SMOOT. But you made the statement that by importation of the English edition the American edition is sold to you cheaper, and if that is the case he must sell at more than 10 per cent discount, if that is the regular price.

Mr. WELLMAN. That is not generally the case; but the American price is fixed with regard to the price that is fixed in England.

Senator SMOOT. For the libraries and for the public generally?

Mr. WELLMAN. Both; yes. And I should like to say that I believe it is an attempt, to a considerable extent, to squeeze more money out of the public libraries, which have become a profitable field. When the net-price system was put into operation five years ago, the discount at which dealers might sell to libraries was absolutely limited to 10 per cent, with a threat to cut off the supply of any dealer who would sell for less. My booksellers in Springfield both told me that they could well afford to sell for less, and one agreed to do so, and he was warned by the American Publishers' Association that if he did so his supply of books would be entirely cut off and he would be put out of business.

Mr. CURRIER. So far as the libraries are concerned, would they suffer very much if they were held down to the importation of one book in any one invoice?

Mr. WELLMAN. No; that would be a minor consideration.

Mr. CURRIER. That would be a minor consideration, would it not?

Mr. WELLMAN. It would—an unnecessary limitation, but a minor one.

Mr. CURRIER. Do you care anything about the clause there in reference to importation for individual use?

Mr. WELLMAN. I do; not from the library standpoint, but from the standpoint of the general public. I think it is heathenish to say that a man shall not get an edition of an English author. I think a book lover has some consideration. Protect the American market by whatever duty you think is right. It is now, I believe, 25 per cent. Make it 100 per cent if necessary, but do not make it impossible. It is hampering education in this country. The editions differ in various ways. I know of an edition issued by Little-Brown on such wretched clay paper that the title-page broke and fell out before we could catalogue it. I can imagine the reply I would get if I wrote to the publisher, the copyright proprietor, "Your book is such a wretched one that I humbly beseech your permission to import a copy from England." His reply would be, "Why, we regret it very much, but the invariable rule," etc.

Mr. CURRIER. That was imported for the library, was it not?

Mr. WELLMAN. No; I am talking now of individuals. We could not import it for a library either under this clause.

Senator SMOOT. That is the only class of edition that they issue?

Mr. WELLMAN. That is the only edition that was issued. And I want to speak about this price that was fixed up by the net-price system. It was claimed afterwards that it was necessary to increase the price to the public about 10 per cent; that everything else had gone up—food, and so on—and why should not books go up? That probably was reasonable. Now, if the price to the public was increased 10 per cent, I could show you by definite figures, which I have published, that the price to libraries was increased 19 per cent. In other words, they have squeezed out from this new and profitable field an extra 9 per cent over what would prevail under ordinary conditions of competition.

The CHAIRMAN. Your time has expired.

Mr. WELLMAN. Thank you.

Mr. GILL. Mr. Wellman, I would like to ask you a question. You say that the price to the libraries is 10 per cent less than to the public?

Mr. WELLMAN. Yes, sir.

Mr. GILL. How is that fixed.

Mr. WELLMAN. By a discount on the bill.

Mr. GILL. I mean who fixes that price?

Mr. WELLMAN. The American Publishers' Association agree to put out of business any man who dares to allow a library, no matter how large its purchases, more than 10 per cent on their new net publications—protected net publications.

Mr. GILL. Where do you get that information from, Mr. Wellman?

Mr. WELLMAN. I get that information from the Publishers' Weekly. It is common information, sir. Everybody knows it. My bookseller was threatened with having his supply cut off entirely.

Mr. GILL. Cut off by the publishers?

Mr. WELLMAN. By the American Publishers' Association—that they would not sell to any middleman, or to him directly, or to any middleman who would supply him, if he allowed the Library, which was purchasing \$10,000 worth of books, more than 10 per cent.

Mr. GILL. You understand, then, that there is a combination on the part of publishers to destroy any seller of books who does not comply with their regulations?

Mr. WELLMAN. I certainly do, sir; absolutely, sir.

Mr. GILL. That is somewhat similar to the plan of the tobacco trust, is it not?

Mr. WELLMAN. I should say it was, sir.

**STATEMENT OF WILLIAM P. CUTTER, ESQ., OF THE FORBES  
LIBRARY, NORTHAMPTON, MASS.**

Mr. CUTTER. Mr. Chairman and gentlemen of the committees, I will, with your permission, preface my remarks by a quotation:

What we need is not vainly to try to prevent all combinations, but to secure such rigorous and adequate control and supervision of the combinations as to prevent their injuring the public, or existing in such form as inevitably to threaten injury, for the mere fact that a combination has secured practically

complete control of a necessary of life would under any circumstances show that such combination was to be presumed to be adverse to the public interest. (From the annual message of the President of the United States, December 4, 1906.)

I hope to be able to show you, gentlemen, that there exists a combination which has secured practically complete control of a necessary of life, and that this bill is especially designed to make this control absolute, and that such control is adverse to the public interest.

The combination to which I refer is that existing between the American Publishers' Association and the American Booksellers' Association, organized to monopolize the market for copyrighted books. That this combination existed on July 11, 1905, is evidenced by the opinion of Justice Ray in the case of *Bobbs-Merrill v. Strauss* (Fed. Rep. 139, p. 155) in which the existence of such a combination is acknowledged to exist by both parties to the suit. That it existed on May 15, 1906, is evidenced by the report of the secretary of the American Booksellers' Association, printed in the "Publishers' Weekly," the organ of the American Publishers' Association, in the issue for May 19, 1906. At the risk of tiring the members of the committee, I will read this report.

The year which closes on May 15, 1906, has been a most successful one for the American Booksellers' Association. The net system is firmly established and working smoothly in all parts of the country. Protection has the support of practically every bookseller, and the large department stores are standing loyally for one price and a fair profit.

\* \* \* \* \*

During the past year we have received many letters from dealers, all asking that we do something in the direction of a better price on fiction, and it seems to me that this convention should bend its efforts toward a \$1.20 price on fiction. The question of a two-year limit should also receive careful consideration.

The number of dealers who are supporting the net system by paying their annual dues is not as large as it should be. The work should not fall upon a few. It should be borne by all, and steps should be taken by this convention toward securing the material support of every bookseller in the country.

Taking it all in all we have had a good year. The future is bright, and the full strength of this association should be thrown toward a \$1.20 price on fiction.

HARRY F. DAVIS, *Secretary.*

Later at the same meeting the following letter was read:

HARRY F. DAVIS,  
*Secretary American Booksellers' Association.*

DEAR SIR: At a meeting of the booksellers of New York, held on Thursday, last, Mr. Simon Brentano presiding, it was moved and seconded that the American Publishers' Association be requested to publish fiction at net prices. I was authorized to communicate this resolution to your association, that you might know the feeling of the New York trade on this subject.

Yours very truly,

E. S. FORHAM, *Secretary.*

NEW YORK, May 12, 1906.

In the account of the session (I am still quoting from the Publishers' Weekly) occurs these words:

The discussion of the question of net fiction was resumed, the result of the discussion being that a committee composed of H. B. Burrows, W. B. Clarke, Clarence E. Wolcott, Alexander Hill, and Harry F. Davis was appointed to meet a committee of the American Publishers' Association to take action jointly as to the ways and means of carrying out the recommendations of the committee.

In addition, the following resolutions were passed unanimously:

Whereas the members of the American Booksellers' Association, now in sixth annual convention assembled, recognize and appreciate the interest displayed by the American Publishers' Association toward the betterment of the condition existing in the book trade of the United States: Now therefore, be it

*Resolved*, That we request the members of the American Publishers' Association to issue in the future all works of fiction on the net-price plan, and would suggest \$1.20 net as the price on books that would under the existing plan be issued at \$1.50 list, and a similar proportionate net price be made on such works of fiction as would ordinarily be listed at \$1 or \$1.25.

Where the publishers and booksellers of the United States organized two membership associations, one known as the American Publishers' Association, and the other known as the American Booksellers' Association, and together controlled the publication and sale of at least 90 per cent of all copyrighted books, the objects of which were to compel owners and dealers of such books to purchase them of the members of the combination at an arbitrary price fixed by it, regardless of the actual value of the books as determined by a demand in the open market, or the condition of the books, and to compel all publishers and dealers of such books to come into the combination, be controlled by it, and sell books at prices fixed by it, regardless of the values of the books, or of the exigencies of the trade and situation of the seller, or be deprived of the privilege of purchasing, owning, and selling such books, through a system of blacklisting, etc., the effect of which would be to cripple the business of any publisher or bookseller outside of the combination, such agreement was a violation of the Sherman antitrust law (act Cong. July 2, 1890, chap. 647, 26 Stat. L., 209) declaring that every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several States is illegal.

I suggest, gentlemen of the committees, that in subsection (a) of section 1 of the bill there be omitted the words "for the purposes set forth in subsection (b) hereof," and that subsection (b) be omitted from the bill.

I might say that fiction now sells to the public at \$1.08. The \$1.20 would be, as you see, 12 cents more to the public. It would be 8 cents or 9 cents more to the public libraries.

Mr. MCGAVIN. Is that done by agreement between these parties?

Mr. CUTTER. Yes, sir.

Mr. CURRIER. Why do you not call that to the attention of the district attorney?

Mr. CUTTER. We have been so busy in presenting this matter to the committee that we have not had time.

Mr. CURRIER. The trouble is that the committee can hardly reach a combination of that kind.

Mr. CUTTER. The committee is, however, in a position to prevent the passage of a law which will make an illegal action legal; and that is what is proposed.

Mr. CURRIER. Well, the committee would be very glad if you would point out what section of this bill you refer to.

Mr. CUTTER. Yes—subsection B, the first section of the bill which was referred to before.

Senator SMOOT. That is as to the sale?

Mr. CUTTER. Yes; certainly.

Mr. LEGARE. How?

Mr. CUTTER. It places a limitation on the sale; not only the original sale, but every time the book is sold after it is published.

Mr. CURRIER. You do not suppose this committee intend to deprive a man of the absolute ownership of a book he buys, do you?



Mr. CUTTER. I, of course, am glad to have your statement that it does not so intend.

Mr. CURRIER. If you think section B does so, why do you not formulate an amendment covering that point?

Mr. CUTTER. I have formulated an amendment.

Mr. CURRIER. The committee will be very glad to have your suggestions on that matter.

Senator SMOOT. Are your objections to section 30 the same that Doctor Steiner's were?

Mr. CUTTER. Yes; but my particular objection to it is that that is the only loophole that we have left to hold this trust—the importation. That is the only way in which we can control the prices of books for public libraries in this country.

Senator SMOOT. Well, you can control them now; you can import one copy instead of two, and you can do it as many times as you want to, under the proposed bill. Is not that true?

Mr. CUTTER. No; not American copyrighted books by an American author. That is especially prohibited.

Mr. CHANEY. You say you have an amendment which would relieve the proposed law of that feature?

Senator SMOOT. You would be satisfied with one book?

Mr. CUTTER. Yes; I am a librarian in a small country town, and one copy is usually enough.

Senator SMOOT. Did you not state, at the last hearing, that you thought any library in this country would be satisfied with one?

Mr. CUTTER. That was my opinion then, but of course I only then expressed the opinions of a few librarians. I see now that some of the other gentlemen prefer and would like to have more than one copy.

Senator SMOOT. Have you ever imported a book?

Mr. CUTTER. I have imported more books than any other librarian in the United States, I think, for the Library of Congress. That is, I was purchasing agent here.

The LIBRARIAN. He was at the head of our purchasing department here, Senator.

Senator SMOOT. Oh, yes; but I mean now?

Mr. CUTTER. Yes, sir; more than about half of the books we buy we import for my library.

Mr. CURRIER. Books protected by American copyright?

Mr. CUTTER. No; I do not say that. I do not know how many of them are protected by American copyright. I only buy those when I can buy them cheaper abroad. If I can get the edition at the same price here, it would be very foolish for me to wait six weeks for it to be received.

My suggestion to remedy that is to strike out from section 1 the words "for the purposes set forth in subsection B hereof," and to strike out entirely subsection B.

Mr. CHANEY. That is all of line 5?

Mr. CUTTER. I do not happen to have the Senate print, sir.

The LIBRARIAN. That was the suggestion, Mr. Cutter, as to which we thought there was an interpretation not at all intended, an application not at all intended, by the framers of the bill.

Mr. CUTTER. Yes. Of course, when I wrote this argument I was not familiar with that fact.

The LIBRARIAN. You understood, Mr. Cutter, did you not, that that section would, as necessarily interpreted, prevent a circulating, a lending library?

Mr. CUTTER. Certainly.

The LIBRARIAN. That it would abolish those, and would prevent the purchaser of a particular book from reselling it or lending it out in any way?

Mr. CUTTER. And it would prevent the secondhand book dealer from doing business.

The LIBRARIAN. That was not the intention of the framers—that the phraseology should have that effect.

The CHAIRMAN. Is that all, Mr. Cutter?

Mr. CUTTER. That is all.

(The committee thereupon took a recess until 2 o'clock p. m.)

#### AFTER RECESS.

The LIBRARIAN. Mr. Bowker and Mr. Johnson are here, as I understand, to represent the Authors' Copyright League. Mr. Bowker, were you to speak first?

#### STATEMENT OF MR. RICHARD R. BOWKER, OF NEW YORK, VICE-PRESIDENT OF THE AMERICAN COPYRIGHT LEAGUE.

Mr. BOWKER. My colleague, Mr. Robert Underwood Johnson, wishes to be heard, I think, for the American Copyright League, and I appear before you as vice-president, in the absence of our president, Mr. Edmund Clarence Stedman, who can not be here because of ill health.

The American Copyright League is the body which since 1883 has in an organized way stood for the rights of authors, and of all authors.

The Constitution empowers Congress to secure "to authors and inventors the exclusive right to their respective writings and discoveries for limited times." For the defense of that principle the American Copyright League exists, and the American Copyright League asks of Congress only that that right, as expressed in the Constitution, should be fulfilled through legislation in the amplest, simplest, and clearest way.

The discussions in these conferences and hearings have, of course, developed differences of detail. That must be. The measure now before you does not represent absolute agreement, but it does represent, as we believe, a just and comprehensive scheme for the protection of the rights of authors. The American Copyright League stands for authors of all kinds, literary, dramatic, musical, and artistic. It emphasizes the protection of the right of the music composer and author as it does the rights of all other authors. If, because of the complexity of this bill or because of opposition to it, its passage should be delayed, the Copyright League is prepared, with the music composers, to ask the consideration of Congress for a specific bill which shall protect the music composer in his property rights. I mention that simply to emphasize to you that the league has an equal thought for composers of all classes.

The league has stood for many years for a revision of the copy-

right law, and I wish, on its behalf, to express the satisfaction which it has felt in the bringing before you of the measure which, as far as possible, represents the agreement of those interests most concerned in copyrights, first, of all the authors, and, afterwards, the interests of those auxiliary to the authors, and, finally, of the public. Every endeavor was made by the Librarian of Congress, as I can personally testify, at the beginning of the hearings to get together representatives of every interest entitled to express some opinion on copyrights, and if there was any failure in that regard it was because at that time it was impossible to find representatives of organizations representing this class or that. Since then two organizations have been formed, which have, as we think, put themselves somewhat in opposition to the principles we advocate. We stand for the fullest rights of the author, and we ask no more of Congress than that it shall, as far as in its power lies, protect those rights.

I shall speak for a moment of the objections brought against the scope of the bill by Judge Walker and by Mr. Porterfield, who has already expressed himself in print, and who is to make an argument to-morrow.

Judge Walker, who, besides his general interest as a member of the public, appeared in the auto-music case as counsel for the Auto-Music Company, has taken the ground that certain things can not be protected because they are not writings, which word the Constitution uses. In Massachusetts it was originally thought that a voter must cast a hand-written ballot in order to fulfill the requirement of the Massachusetts constitution for a written ballot. But it was ruled otherwise in the courts, and Congress has rightly seen fit to give the widest interpretation to the word "writings." In fact, Congress has included sculptures, which only by the most liberal interpretation can be therein included, as "visible expression." It is easily seen that the effects of the decisions have been to widen rather than to restrict the copyright field, and the Supreme Court has stated that it was the intellectual products of the author, and not any particular form, which the Constitution intended to protect.

Take the case of the phonographic record, the character of which as writing has been questioned. It is a curious fact that the earliest known writing, the Assyrian hieroglyphic, was made by an instrumentality very similar to the phonographic needle of to-day impressing itself upon plastic material.

As a curious incident it may be worth while to relate that for the Edison dinner in New York not long ago I was asked to prepare something for the menu, and it occurred to me to prepare it without writing. I put the result of my mental effort, first, upon the phonographic record, and that was afterwards from that record put in type by the compositor, and I heard the proof read through the telephone. There existed for a time no copy except the copy on the phonographic disk. That seems to be a fair proof of the fact that that sort of a record is a writing.

That is now developing very considerable importance because of the invention recently made of the telharmonic dynaphone of Doctor Cahill, through which musical works can be reproduced by telephone, and I wish to submit that it is not fair to the musical author to have his work given to the public in that way or in any other way unless

there is fair payment to him for the exclusive right which the Constitution enables Congress to guarantee to him.

I shall not, however, go into details as regards music here, because I understand that that subject will be specifically discussed another day. But I do wish to remind the committees that after all the word "writing" is, as has been pointed out by the courts, an indication not of the method of copying, but only a characterization of the original work. The musical composer is even more than a literary composer or writer. He must make his own manuscript, because he can not even use a phonograph or a stenographer to record his thoughts. His thoughts are peculiarly recorded, his manuscript is his own handiwork, and the Constitution, in authorizing exclusive rights to the author, particularly justifies, therefore, that any particular form of writing by which publication can be effected entitles the author to the benefit of some return.

It has always been a favorite device of those who desired to obtain some benefit from an author's productions to claim that it is not fair to the public that he should have property rights in the ordinary way, and there was an effort, particularly in 1891, to have Congress pass upon what is known as the "royalty scheme"—that is to say, that in the so-called interest of the public, the author should be compelled to part with his exclusive property rights upon the basis of a royalty, say of 10 per cent. That is not an absolute confiscation, but is an absolute restriction of property rights, and that was the proposition. But the right of the musical composer, as we contend, rests on the language of the Constitution that exclusive rights are to be given to the author, and we contend that that right must be protected against any form of copying or reproduction or publication.

A similar plea has been made by the dissenting librarians, that in the interest of the public the rights of authors as to their market should be restricted. The first right which any producer has is to sell his property, to sell it as he pleases, and to whom he pleases. Strictly, there should be no such exception as was made part of the bill of 1891, quite at the last moment, and rather incidentally.

In the course of the discussions between the publishers and the librarians there was some acrimony developed as to prices, but it came about that the copyright league endeavored to do its part in bringing about a fair arrangement, and the compromise which has been brought before you is largely the result of the endeavor of the authors, through an intermediary body, to make an arrangement between the publishers and the librarians which would be a fair compromise. In doing so the league definitely left out of the question the matter of authors' absolute rights. It feels that any limitation of that kind is a limitation on the exclusive right of the author to his property, and it seems a pity that the question should be reopened to the extent of developing further acrimony. I can speak incidentally as a trustee of the library system which circulates 3,000,000 books a year (the Brooklyn Library), and also as president of the Stockbridge, Mass., Town Library, my country home, and so from the library point of view I can not see how there is any right in the libraries to have any privilege as against the author's right to control his property.

The right to import seems to be desired by the protesting libraries

as a sort of means of control over prices, but it is submitted on behalf of the league that that is not a matter that can come within the purview of a copyright law, but should be taken care of by the law of the country as applied by the Federal courts on general principles. We ask that the copyright law should not be made the means of introducing that question into our legislation through that side door. The question is not a large one. It has appeared more in prospective than it really deserves, and it seems to me that the committee can safely rest on the compromise which has been arranged after a great deal of discussion and consideration. Speaking still as a representative of the copyright league, I was most glad to hear the intimation from the committee that there was no intention on its part to restrict in any specific way the author's rights.

Upon reading the argument of Mr. Porterfield it seemed to me that a mistake was made in supposing that the phraseology of the present bill goes too far in regard to the right to vend. The right to vend is the right to control sales. Whether any restriction can be imposed upon the original sale of a chattel is not a question of copyright, but of contract.

In the same way, Mr. Porterfield, I think, has made an error in his attack on the bill in suggesting that it prevents a fair use of a copyrighted work. The existing law covers comprehensively an entire work, and necessarily its parts, in providing that a work may not be copyrighted except with the consent of the author. Nevertheless, the courts permitted fair use, and there is no desire on the part of the authors, or, I think, of publishers, to restrict the fair use of copyrighted material. The general proposition is simply that one man shall not use another man's brain without paying for it, whether that man be a worker in the great literary field or a member of the great body of the public. These are the fundamental principles on which the league asks that the provisions of this bill should be tested. In other words, it asks that this committee and Congress should have before them continuously the thought that the purpose of any copyright bill is to protect the exclusive rights of the author in whatever shape or form or method those rights may appear.

My colleague, Mr. Johnson, will take up somewhat in detail various suggestions which the Copyright League has to offer, because we feel that these hearings have been of the greatest value in bringing out details here and there, serving to clarify the subject; and later the league will be represented more directly, it may be said, by authors of great popularity, whose books have had large sale and who can speak to you better than we can as to one other feature of the bill—the extension of copyright. The Constitution certainly does provide only one restriction—that the exclusive right shall be for a limited time. That has been so narrowly construed that the venerable and venerated Chaplain of the Senate, Rev. Edward Everett Hale, who, in writing "The Man Without a Country," did for our nation in the time of the civil war a service second only to that of the man who led the troops to battle—I say that has been so narrowly construed that that book is now out of copyright and the author can not legally receive a single penny as a reward for that noble work, although the widows and orphans and other relatives of the private soldiers who fought in that war are still receiving pensions.

The league asks, therefore, that justice shall be done to authors by lengthening the term to a period which is more in line with the action of other civilized nations than our present copyright law. It asks, further, that in all the consideration given by the committee to the subject more weight shall be given to the fact that the musical composer is as much entitled as any other author to the exclusive right, in whatever form copies or reproductions may be made, of his writing.

*Memorandum on the bill to secure intellectual property, being "A bill to amend and consolidate the acts respecting copyrights" (Senate No. 6330; House No. 19853; May 31, 1906).*

[By R. R. BOWKER, vice-president American Copyright League.]

Constitution, 1787, Article I, Sec. VIII, 8: "The Congress shall have power \* \* \* to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries."

It was a wise man who said that he believed in the Constitution, but not in reading it by the light of a tallow dip. In the narrow sense the dictionaries define "author" as "one who composes or writes a book" (Webster), and "writing" variously as "a record made by hand," "a production of the pen," "any expression of thought in visible words" (Century); "anything expressed in letters" (Webster, Stormonth, Standard); "a written paper," "a legal instrument" (Johnson); "a literary production" (Chambers); "forming by the hand letters or characters on paper or other suitable substance" (Buvier's Law Dictionary); "words made legible by any device," "a document, whether manuscript or printed, as opposed to mere spoken words" (Rapalje and Lawrence, Law Dict.); "expression of ideas by visible letters" (Anderson's Dict. of Law). For years Massachusetts voters cast a handwriting ballot until the courts held that a printed ballot fulfilled the "written ballot" requirement of the Massachusetts constitution. But in the wider sense an author is "a creator and originator" (Webster, Standard), and a writing is the record of a thought or idea. Mr. Sousa found that the dictionaries in the Philadelphia Library used at the time of the making of the Constitution gave to the word "writing" the broad definitions of "a composure" and "playing the author." Congress, upheld by the courts, has specifically included (law of 1870) under "writings" in the Constitution a "statue," "statuary," "model," without requiring the artist to make a preliminary sketch (if that be specifically a writing)—otherwise, as sculptors are not "inventors" making "discoveries," they could not be protected at all; and in other countries protection is extended to oral delivery of an address presumably but not necessarily written. It might be claimed under a restrictive interpretation of the Constitution that only works specifically relating to science and useful arts might be protected, although literature and the fine arts are admittedly especial subjects of copyright. While it is for the judiciary and not for the legislature to construe or interpret the Constitution, the right of Congress to pass laws based upon its understanding of the Constitution, subject to the final decision of the Federal courts, has not been challenged.

The opposition to this bill has been voiced chiefly by the legal representatives of the manufacturers of mechanical instruments, of perforated music rolls, and of phonographs or cylinders or disks therefor, i. e., from those who have "pirated" musical compositions and are interested in excluding "sound records" from copyright protection. These have made the astounding and unfounded assertion that the proposed bill represents a "star-chamber," "log-rolling," "conspiracy," entered into at the initiative of the Æolian Company as a "music-roll trust." The American Copyright League has for many years favored a revision of the copyright laws, and it has had no communication, directly or indirectly, with the Æolian Company, nor any knowledge of any relations by this concern or its representatives with the copyright conferences. These conferences were confined to representatives of organizations interested in copyright and legal authorities, meeting at the invitation of the Librarian of Congress as though in his office at Washington, and, although the meetings

were private and unreported, they were in no sense secret. No organization of "sound-record" interests was known, and if the Æolian Company had, as alleged, representation through the music publishers that fact was unknown to and had no influence upon the other participants. The American Copyright League stands, as it has stood for a quarter of a century, simply and solely for the protection of authors' rights to the fullest extent, and it asserts that a musical composer is as fully entitled as is the author of any other creative work to the exclusive and full benefits of his compositions in whatever manner reproduced. These opponents of the bill base their objections largely on a restrictive definition of the word "writings," and Mr. A. H. Walker, recently counsel for the Auto-Music Company in the *White-Smith v. Apollo Company* sound-record case, criticises the bill because this word "writings" is interpreted throughout the bill by the word "works," although this accurately reflects the understanding of Congress and the interpretation of the courts. They would, in fact, confine copyright protection specifically, it may be said, to e-y-e-deas—that is, visible records—and exclude as not visible or legible by the eye copies of musical compositions mechanically made and interpreted.

The United States Supreme Court, in the *Sarony* decision, extending the principles of the copyright act to cover photographs, said: "By 'writings' is meant the literary productions of those authors, and Congress very properly has declared these to include all forms of writing, printing, engraving, etching, etc., by which the ideas in the mind of the author are given visible expression. The only reason why photographs were not included in the extended list of 1802 is probably that they did not exist, as photography as an art was then unknown." It seems evident that the phrase "visible expression" as used in this decision was intended to give a broad definition and not to narrow the definition by exclusion. This view is confirmed by the later decision of the same court in *Holmes v. Hurst*: "It is the intellectual production of the author which the copyright protects and not the particular form which such production ultimately takes; and the word 'book' is not to be understood in its technical sense as a bound volume, but any species of publication which the author selects to embody his literary product."

The earliest writing which remains to us is in the Assyrian wedge-shaped inscriptions, made by pressing the end of a squared stick into a soft clay cylinder; the phonograph point inscribes its record in exactly the same manner upon the "wax" or composition of the cylinder or disk, for the mechanism only revolves the roll, and the point is actuated by the sound vibrations. The words "phonograph," "graphophone," and "gramophone" literally mean "sound writing," for the Greek form graph, the Latin form scrib, and the Saxon form write, equally parts of our language, denote exactly the same meaning. It is even probable that a future development of phonograph impressions (the third dimension being translated into breadth of stroke as can be mechanically done) will give ultimately a visual phonograph alphabet even more natural and logical than Professor Bell's remarkable system of "visible speech," which, of course, like all alphabets, can be read only when the reader has mastered the significance of the symbols. Mr. Edison has himself made some experiments in this direction, though the confusion from the overtones, which give quality of speech, has so far prevented result. A large share of literary productivity to-day is by voice dictation recorded mechanically by a stenographer on the typewriter or directly on the phonograph disk, and I may instance from personal experience a further step. As one of the committee for the Edison birthday dinner, commemorating the twenty-fifth anniversary of his invention of the incandescent lamp, I was asked to supply some original verse, and it occurred to me to put this in shape by help of Mr. Edison's inventions without direct or indirect hand or type writing. Accordingly I completed the verses mentally without use of paper and voiced them into an Edison phonograph, verifying this through the telephone, and the lines were set in type by the printer from the sound record, and thus printed on the menu for the dinner. Thus my formulated ideas were recorded through the nerves and other mechanism of the vocal organs instead of through the nerves and other mechanism of the hand directly by the phonograph point on the phonograph cylinder; and it seems a common-sense inference that if I had caused copies of the phonograph cylinder, though not legible in the ordinary sense, to be published instead of the secondary copies in print I should be as much entitled to copyright protection in the one case as in the other. The "telegraphone" directly records on a steel tape the sounds of the human voice as sent through the telephone, and

by an absolutely invisible rearrangement of the magnetized particles of steel makes a writing in which there is no possibility of visual legibility.

Moreover, invention is now developing a series of reproducing mechanisms, such as Doctor Cahill's "telharmonicon," or dynamophone, in which musical compositions will be translated to the ear without the interposition even of a cylinder or disk sound record; and it seems a common-sense inference that the musical composer should have as full rights in this as in other forms of copying or reproducing his thought. Budapest is said to have not only a telephone "newspaper," but a system of reading novels and other works of literature to telephone subscribers, and if this should reach such proportions as substantially to reduce the sale of the printed copies of a new novel from which the author would receive benefit, it would also seem a common-sense inference that the same or an equivalent royalty should be paid him.

In music writing or notation there are two and only two essentials: Relative vertical position, showing pitch, and relative horizontal position, showing duration of notes. The earliest form of our present music writing is the system of the "large," "long," "breve," and "semibreve" notes, in which the pitch was shown by the vertical relations of the notes, and the length of the note by the length of the black mark, the "large" mark being twice the length of the "long" mark. This corresponds closely to the perforated music roll of to-day, which could be read by a practiced eye with, and probably without, staff lines to the extent that if every other form of reproduction were destroyed the melody and harmony of a musical work could be reproduced into the ordinary notation of music writing.

I speak from personal knowledge of these music rolls, having had a mechanical instrument for some years. The different kinds of rolls differ in the relative spacing and in distance from the edge of the roll, which gives the standard, but a foreshortened photograph of any, bringing them to the same scale, would pattern closely the early form of music writing above cited. The London postal telegraph system dispatches newspaper material from St. Martin's Le Grand throughout the Kingdom from continuous perforated ribbons made somewhat in the same way, visible and legible only to an expert, and reproductions by the medium of this device would certainly not violate copyright. In the "Perforated Roll Case" of *White-Smith Company v. Apollo Company*, in which A. H. Walker participated as counsel for the Auto-Music Company, Judges Lacombe, Townsend, and Coxe, in the United States circuit court, in the decision, to which they considered themselves "constrained," to use the word of the court, by the necessity of strict construction, stated that "a perforated roll is not a copy in fact" (i. e., an exact reproduction) "of complainants' staff notation;" that "it is not designed to read as the original staff notation is;" that such reading "would establish merely a possibility of use as distinguished from an actual use," and that the rolls "are mere adjuncts of a mechanism which appropriates the author's property and publishes it by producing the musical sounds." This decision refers, of course, only to the present statute, and is yet to run the gantlet of the Supreme Court, but it may be observed that the present law gives to the author or proprietor of a musical composition the sole liberty not only of printing, but of publishing, copying, vending, performing, or representing a musical composition; that the statute does not restrict "copying" either to a copy of "staff notation" or from or in any particular form, but prohibits in general any copy of a musical composition; that there is no suggestion in the statute that the copy must be one to be read, e. g., a copy of a sculpture; that any sound-record is in the wide sense as truly a copy of a musical composition as a printed sheet, which is not a copy, in fact, of the author's manuscript writing; and that as the roll has for its sole purpose the performing by the aid of a mechanism useless without it a musical composition, just as a printed sheet of music has the sole purpose of performing by the aid of the voice, the piano, or the orchestra, a musical composition, the maker and vendor of the roll is in exactly the same position as the maker or vendor of a printed sheet of music. These considerations give some ground for the opinion that the Supreme Court may reverse this decision and include sound records under the present copyright law; but this decision of the court makes the more emphatic the further opinion of Judges Lacombe, Townsend, and Coxe, when these eminent judges state, as if to the present committee, "that the rights sought to be protected belong to the same class as those covered by the specific provisions of the copyright statutes, and that the reasons which led to the passage of such statutes apply with great force to the protection of rights of copyright against such an appropriation of the fruits of an author's conception as result from the acts of defendant."



But even if phonograph and perforated records should not be considered, as is sculpture, to be "writings," the arguments of the opponents of this bill do not fit the case. The Constitution explicitly provides that authors shall have exclusive rights to their writings. This can not mean exclusive rights to their written manuscripts, for these are protected by common law and no constitutional provision was necessary. It meant and means evidently that authors shall have exclusive rights to the benefits of their writings, the usufruct of the property they have created, and that means practically a monopoly control over all copies or reproductions from such writings, whether the copies are in handwriting, printing, or any other form. A musical score is definitely a writing, for it is even more than a literary manuscript originally in the personal handwriting of the composer himself, without the intervention of a stenographer or a typewriting machine. Therefore, if the narrowest meaning of the word "writing" should be interpreted into the Constitution such as would exclude sculptures and other works which are admittedly proper and legal subjects of copyright, it would still specifically include musical and dramatic as well as literary manuscripts. There is no specification in the Constitution confining the exclusive rights over writings to copies in handwriting or print or any other stated process of reproduction; in fact, the Constitution does not use the word "copyright" or in any way limit by specification the comprehensiveness of the exclusive rights Congress is thus authorized to secure. Indeed, Congress in the copyright laws has interpreted the Constitution to cover the several artistic or reproductive processes from time to time developed or invented; thus in the law of 1865 the provisions of the copyright laws were extended to include "photographs," which did not exist at the time of the adoption of the Constitution—which word specifically means "light writings," as phonograph records specifically mean "sound writings."

The position taken by the American Copyright League is that an author is literally entitled to the exclusive right—that is, the exclusive benefit—in his writings, in whatever form the writings—that is, his recorded thoughts—can be reproduced for sale or gain. If Mark Twain writes a book or Bronson Howard a play or Sousa or Victor Herbert a musical composition or Millet makes a painting or French a statue, each is equally entitled to whatever benefit inures from his creative genius. Mr. Sousa has stated clearly that although Caruso has been paid \$3,000—and the fact widely advertised—for singing into a phonograph record, and his own band (not under his leadership) has also been paid for playing his compositions and those of others into the phonograph horn, he has never received as a musical composer 1 cent for such use of his creations, though from twenty to a hundred of his compositions are to be found on the catalogues of the several manufacturers of mechanical instruments. Mr. J. Howlett Davis, who properly appeared as an inventor in defense of his own inventions in mechanical instruments, which he mistakenly believes would be rendered useless if the copyright protection were extended to sound records, really asked that Congress should protect the thing which he had invented and compel users to pay for it, but should permit him to use the thought which the musical composer had invented and expressed without paying for it. His argument analyzed presents an even stronger argument for the proposed copyright bill than for the protection of patented inventions. When Mr. Sousa buys a patented cornet he has paid for the use of it, but Mr. Sousa makes no claim either to make another cornet like it or to play copyrighted musical compositions for profit without payment or permission. A piano, a pianola, a music roll or new form or mechanism is patentable; a musical composition as played on a piano by hand or by mechanism, whether reproduced on a printed sheet or a mechanical roll, is copyrightable; but each should have like protection. I speak from specific knowledge as one who has taken out patents as well as copyrights and as the active head for some years of the Edison Illuminating Company, of New York, and a participant in successfully defending the Edison lamp patents. Mr. Edison, both as an inventor and as a manufacturer of his own inventions, has profited much more than a million dollars from his patents, and would naturally be expected to be foremost in upholding the right of authors to payment for their brains. It is to be regretted that his phonograph company has instead opposed the protection of musical composers and claims the right to use their brains on Mr. Edison's invention without payment.

The legal gentlemen representing the sound-record "vested interests" assert that millions of dollars had been invested in the industry, and that they should have a right, on paying a dollar for the printed sheet of music, to translate that into sound records and multiply it indefinitely, paying themselves a profit

on these millions of dollars without an additional penny to the musical creator. Their clients knew perfectly well that they were taking chances in appropriating the musical compositions for which they had not paid, and if they should now be mulcted under a decision of the Supreme Court or required in future by the passage of this bill to recognize the rights of the musical writer, they can have no criticism to make. Their \$56,000,000 boasted capital should be in fact 56,000,000 arguments for the composer. I have bought many of these perforated rolls, which sell to the public at from \$1.50 to \$3 or more, for which the perforators are said to receive a cent and a half per running foot, or from 25 cents to a dollar per roll; and I may suggest that the price and margin of profit are quite adequate to pay a dime or a quarter a roll to the musical writer without increase of price to the public.

Mr. Charles Porterfield, writing in *Law Notes* (published at Northport, N. Y.), who joins in the opposition to the protection of the musical composer, makes, like Mr. Walker, an attack on the bill in general, asserting, e. g., that under the fundamental clause that the copyright shall include "the sole and exclusive right \* \* \* to sell, distribute, or let for hire, or offer or keep for sale, distribution, exhibition, or hire any copy" of a copyrighted work, a person other than the copyright proprietor could not own a book, nor bequeath it, nor an estate dispose of one, nor a bookseller keep it for sale, nor a library lend it. Mr. Porterfield at the same time expresses satisfaction with the present law. But the present copyright law gives to the proprietor the exclusive right of "vending" a copyright work, and the phraseology of the new bill simply makes more clear the right of the copyright proprietor, scarcely to be questioned, to control the chattel property in which his incorporated right is embodied. Any owner of property may do as he pleases with it, whether it is a piece of land or an umbrella or a manuscript or a book. He can keep it or sell it or let it or show it, as he pleases or not. The owner of the copyright of a book can under the present law publish a limited edition of a book and sell it to whom he may please. He should certainly be able to sell his book under restrictions if he so chooses, as the proprietor of a piece of land may restrict his land in selling it from use as a stable. But it is scarcely to be supposed that an author or copyright proprietor is likely to prevent the sale of his book by a bookseller or prevent its use by a library any more than he does so now. The same is to be said as to "fair use" of extracts from a copyright work, which is no more permitted or prevented by the existing law than by the proposed bill. In his sweeping condemnation of the pending measure Mr. Porterfield also can see no difference between section 2 and section 21. The first is a negative or preventive provision intended to safeguard the proprietor of an unpublished work in any existing common law or equity rights against copying, publication, or use of his work—a provision which, if included in the famous statute of Anne might have saved England and this country from the serious denial of common-law rights which that statute imposed upon English and American law, while section 21 is a positive and specific provision for the collection of damages and the obtaining of an injunction. Before the year 600, when Columba surreptitiously made a copy of a book owned by his teacher, Finnian, the copy was reclaimed under the King's decision "To every cow her calf;" and it was to enforce by practical remedies the common law that Parliament passed the statute of Anne, with the unfortunate result that a divided court construed the statute to supersede the common law.

The opponents of this bill, chiefly the automusic interests, recently organized into the miscalled "American Musical Copyright League," which should rather be named an anticopyright league, and the dissentient librarians, organized as the Library Copyright League, have taken the usual course of falling back upon the plea that in the interests of the public the author should not have exclusive right to his writings and to manage his own affairs, but that Congress should prescribe how he should market his property. This commonly takes shape in the royalty plan, which the latest book on copyright, that of Augustine Birrell, M. P., a member of the present British cabinet, criticises as a "preposterous scheme," and the sound-record representatives have incidentally introduced this same suggestion, that Congress should provide for "fair play" to the public by permitting any maker of sound records to reproduce any copyrighted work on fair payment to the composer. Now, the essence of copyright protection, as of the protection of any kind of property, is that during the "limited term" of protection the author shall have exclusive right to sell or dispose of his own property as he likes. Copyright is a monopoly only in the sense that any ownership is a monopoly. Says Herbert Spencer: "If I am a

monopolist, so also are you; so also is every man. If I have no right to those products of my brain, neither have you to those of your hands. No one can become the sole owner of any article whatever; and all property is 'robbery.'" In the copyright debates of 1891 Senator O. H. Platt rightly said: "The very essence of copyright is the privilege of controlling the market. That is the only way in which a man's property in the work of his brain can be assured." The proposed bill specifically provides that the author may sell his rights of reproduction severally, and if he chooses, Mr. Sousa could under the bill sell separately the right of printed publication and give notice that any manufacturer of sound records may utilize his compositions on payment of a royalty which he may fix; but the law should not compel or restrict him in the matter. In the case of books a publisher often suggests to the author the general idea of a book, so that it would be doubly unjust to permit any other publisher to issue that book on the compulsory royalty scheme; and this may be true, though to less extent, in music.

The measure, in accordance with the precedent of the act of 1831, provides in section 19 that subsisting copyright may be extended through the longer term of the new measure, and also provides in section 6 for new copyrights in the case of secondary work based upon present copyrighted works or works in the public domain. But there seems no ground whatever for the contention of the opponents of the measure that in these provisions the existing "sound-record" reproductions of a copyright musical composition would be included under the new bill, unless the decision of the Supreme Court should indeed include them under the present copyright law. With regard to existing material, it is only new arrangements that are made the subject of new copyright—e. g., in the case of the well-known Schubert-Gounod Ave Maria, if the fundamental work had not been copyrighted previously to the passage of the proposed bill, or the copyright had expired, no one could be prevented from using it or making an arrangement of it, and an interpreter like Gounod could copyright only his distinctive arrangement. This should dispose of the plaint of the sound-record opponents that the status of their existing property would be destroyed by the passage of this bill.

Aside from the sound-record interests, the only serious opposition to this bill has come from certain library interests, represented in the Library Copyright League, in protest against the restriction of importations. But, as Senator O. H. Platt in the copyright debate of 1891 also said: "The fundamental idea of a copyright is the exclusive right to vend, and the prohibition against importation from a foreign nation is necessary to the enjoyment of that right. The privilege of controlling the market is indeed essential." The copyright laws of foreign countries, and our own copyright legislation previous to 1891, carefully safeguard this right; a foreign copy of an English copyrighted book may not be imported into free-trade England without the author's written consent. Unless an author can assure to an American publisher the American market he can not get from that publisher the price he would otherwise secure. In the international copyright amendment of 1891 Congress accompanied the manufacturing clause which prohibited the importation of foreign copies, even with the consent of the author, by a proviso permitting certain importations even without the consent of the author, on the homeopathic principle of offsetting one restriction upon authors' rights by another restriction upon authors' rights! In the proposed bill the American Copyright League, acting on behalf of authors and to some extent mediating between publishers and librarians, has accepted a compromise permitting single copies to be imported by libraries without consent of the copyright proprietor. This permission was not extended to books by American authors, unless they should be out of print, not with any desire to get better terms for American than for foreign authors, but because it would be a very serious matter to permit ad libitum the encroachment on the American market. Moreover, the American author does not get for foreign editions the same royalty which he gets for American editions. This compromise has been accepted by the representatives of the American Publishers' Copyright League on the one side and by the executive board as well as the delegates of the American Library Association on the other. But certain libraries, apparently in the desire to have a weapon against publishers in a contention about prices and discounts, object even to this compromise, and desire to import freely without restriction and without authors' consent. The question of prices has no place in a copyright bill, nor can I, from the point of view both of a trustee of one of the largest circulating library systems

in the country, the Brooklyn Public Library, and of president of a Massachusetts town library, that of Stockbridge, my country home, recognize that libraries, which depend for their very being on authors, should challenge the rights of authors over their own property. The incidental fact that libraries are permitted to import free of duty has no relation with copyright, and the confusion of protection to property with tariff protection is equally misleading. Herbert Spencer, free trader above all, emphasizes the right of property in ideas as essentially a right of private ownership, and Henry George, who copyrighted his own books, has not proposed even as to land that the usufruct of a man's labor should be taken from him. There can be no difference between free traders and tariff protectionists as to such property rights.

The Constitution imposes only one limitation on the comprehensive rights of authors, in the provision that protection shall be "for limited times" only. This provision has made the discussion of perpetual copyright purely academic in this country. The proposed bill adopts the suggestion of the American Copyright League for a term of life and fifty years for originative as distinguished from secondary works. A copyright term extending through and beyond the life of the author has been adopted by thirty-seven countries, or more than half of those which have copyright laws, while five others give perpetual copyright; the term of life and fifty years is adopted by France and fourteen other nations, and although life and thirty years is proposed in Lord Herschel's British draft, life and fifty-years has also been proposed as an alternative in England (Birrell on Copyright). The injustice of any other than a life term is exemplified by the facts that Emerson, Longfellow, Lowell, Whittier, and Holmes outlived their earlier copyrights; that Edward Everett Hale, whose "Man Without a Country" did for this nation a patriotic service scarcely second to that of the great generals of the civil war, has no longer copyright in this work, although private soldiers, their relicts and descendants, are still paid pensions; and that many others of our foremost authors have been, or under the present system would be, deprived of their created property within their lifetime. The term proposed in the bill provides for the author and his children's children during the probable minority of the grandchildren, a period to which the entail of realty is limited by our laws. One of the opponents of this bill has taken the strange position that such a term is not a "limited time," although, citing the case of the daughters of Harriet Beecher Stowe, who have been left without benefit from her greatest works, though publishers are still profiting from them, he favors a straightaway term of one hundred years, which would be on the average a longer term than that provided in the bill. A term of fifty years is proposed for secondary or encyclopedic works.

Two important improvements upon the present law should be emphasized: That copyright is secured by (and dates from) publication, with "notice affixed to each copy thereof published or offered for sale within the United States by authority of the copyright proprietor," and that informalities or incidental lapses are not to void copyright, the innocent infringer, pending the fulfillment of the statutory requirements or actual notice, being duly safeguarded. Hitherto an error of a publisher's clerk or in the copyright office might actually forfeit all rights of an author, and this is carefully provided against in the proposed code. The date of publication is logically and properly defined as "the earliest date when copies of the first authorized edition were sold or placed on sale." Previous to that date the unpublished work is protected by the common law or in equity as supplemented by the provisions of this act. It should be emphasized that the public performance of a dramatic or musical composition or the public exhibition of a work of art does not constitute publication, which is by the multiplication of copies; this distinction is made clear throughout the proposed bill and should be carefully preserved. The bill follows the settled practice in this country as regards stage right and the latest judicial decisions as regards art exhibition. In respect to formalities, Mr. Ogilvie's argument that notice should be required on foreign editions—that is, extraterritorially—and that the accidental omission of notice from a single copy should practically void the copyright, is not supported by the instance which he cited, which refers to one of the well-known series of Webster's Dictionaries, notoriously of American origin, in a specific case where the changed title on an English edition compelled the copyright office to answer technically that it had no record of a book of the stated title. Justice to the author requires that informalities should not void copyright; justice to the unwitting infringer requires that he should not be held responsible for innocent transgression—and both are carefully safeguarded in this bill.

It may also be pointed out that the opening of rights of dramatization and translation after ten years is a restriction upon authors' rights not found in the present law. Such restriction of the right of dramatization seems to have no precedent in other copyright systems, and it is pointed out by the dramatists that the successful dramatization of "Ben Hur," involving large outlay and large profits, was not practicable until much more than ten years after the copyrighting of General Wallace's great novel. Such restriction of translations is a feature of the Berne convention, but not of our existing copyright law; and it has been the understanding that the new measure would extend and in no wise restrict the rights of authors. Moreover, the British Royal Commission, after summarizing the arguments on both sides, reported its conclusion that there seemed no sufficient reason that the right of translation should not be coextensive with copyright. It is therefore suggested by the American Copyright League that reference to dramatization should certainly be omitted from section 20, if the committee should decide against the omission of section 20 altogether.

The American Copyright League would respectfully emphasize the fact that the Constitution and the proposed measure provide for securing to authors their exclusive rights, and that any limitations of such rights other than the single one required by the Constitution are exceptions which require in each instance specific and adequate justification. As Senator Evarts pointed out in the debates of 1891: "The sole question is what we shall do concerning something which is the essential nature of copyright and patent protection, namely, monopoly." Copyright, as has been pointed out, is a monopoly not in the offensive sense, but in the sense of private and personal ownership only; the public is not the loser but is the gainer by the protection and encouragement given to the author. The whole aim of copyright protection is to permit the author to sell as he pleases and to transfer his rights collectively or severally to such assigns as he may choose. In making exceptions to this fundamental rule, therefore, the burden of proof should be upon those proposing to limit the exclusive and comprehensive rights of authors. The league, as representing authors' rights, has accepted certain limitations only as concessions in recognition of temporary or local conditions. The copyright legislation of most countries, as especially Great Britain, prohibits importation even of authorized foreign copies except by the written consent of the author, and in the compromises which led to the international copyright amendment of 1891 the league assented to the manufacturing clause limiting copyright to editions lithographed or printed in this country, a limitation which it trusts will not be extended, as suggested by one critic of the bill, to "other processes" of reproduction; and it was to balance this limitation that certain permissions of importation to societies and individuals were also accepted. One point more the league would emphasize; the prime reason for a revision of our copyright legislation has been the contradictory and confusing state of the present law. The proposed measure is to give a unified and consistent code. A copyright law is necessarily complex, and its several parts interdependent; and it is hoped such modifications will be considered, both in principle and in phraseology, with reference to other parts of the bill, and that the experience and the excellent workmanship of the Librarian of Congress and the Copyright Office may be availed of in the final shaping of any changes upon which the committees or the Congress may decide.

[For amendments proposed, see Appendix, p. 402.]

#### STATEMENT OF MR. ROBERT UNDERWOOD JOHNSON.

Mr. JOHNSON. Mr. Chairman, if I had taken the precaution to copyright my own introductory remarks, I think, even under the present inconsequent and imperfect penalty clause of the copyright bill, I might have been able to obtain considerable redress from Mr. Bowker.

It has been said in this committee hearing this morning that certain persons were engaged in a conspiracy. I plead guilty to being one of the persons who for twenty-four years has been engaged in a conspiracy of justice. It was my lot to be the secretary of the American Copyright League and of the joint committee of the different organizations which urged the copyright bill passed on the 3d of March, 1891; and from that time to this, although there has been

very little effort to do anything in the way of amendment of that law, the American Copyright League has felt it to be its special duty to keep the run of copyright matters and to keep guard over what had already been obtained.

For we believe, as representing the producers in literature, who are the only persons recognized by the Constitution of the United States so far as copyright is concerned, that we have a special call to guard the principle of copyright. Others may look out for their conveniences, others may look out for their privileges, others may look out for trade relations; but it falls peculiarly upon the producers and the representatives of the producers of literary, artistic, musical, and other property to stand for the highest objects that can be brought before the joint committee of Congress.

We therefore come to you with the words of Webster, and we say to you as men who have taken your constitutional oaths to establish justice, that "justice is the first concern of man on earth."

We follow that with a quotation from Longfellow, who says that a good principle works well in a particular direction.

You are going to be called upon—you have already been called upon in this presence here, you have been appealed to in the matter of trade relations, in the name of invested capital, in the name of many other things of subsidiary importance to the principle of copyright. Says Shakespeare:

This above all: To thine own self be true,  
And it must follow, as the night the day,  
Thou canst not then be false to any man.

If the committee is true to the principle of copyright it can not be false to the interests, to the legitimate and proper interests, of any manufacturer and publisher, financier, or other person who may be deemed to be interested in this subject.

In 1891 we were met in our campaign with exactly the arguments that have been urged here in favor of the mechanical reproduction of music. At that time there was no mechanical reproduction of music, or there would have been no need at the present time to consider any suggestion to make any alteration in this bill. At that time it was said to us that the unauthorized reprinters, who at that time were known by the name of "pirates"—for convenience only—had a very large amount of invested capital, and that their business was going to be ruined by the fact that the Congress of the United States was going to give them the right to acquire ownership in the things which they distributed. I challenge anybody to point to any calamity of that sort that followed the passage of the copyright law.

We were then told that the prices of books were going to be raised beyond the dreams of avarice, and we were told of other calamities. None of them have come. There never was a time when there was more vitality in the production of literature than to-day, and it is due in large part to the international copyright law. There never was a time when authorship was so well compensated; there never was a time when literature was so accessible at cheap prices. There is hardly an author of note who does not contribute to the magazines, and their number has been the wonder and envy of every other country. In other words, we went to those gentlemen who were engaged in the unlawful use of other men's brains, and we said to

them, "Now we show you a more excellent way," and we have shown them a more excellent way, so that they can now lie on their beds without any compunction of conscience for having taken the property of other men to sustain their own lives.

Therefore, I say to you, Mr. Chairman and gentlemen, that in this case it is important to be borne in mind that the fundamental question is the question of right, the question of exclusive right, the same right that a man may have in his horse or house. For when people come to you and say to you that there is such a thing as copyright which is not exclusive, they are guilty of a contradiction of terms.

We have sent you a copyright bill which is the result of the most careful consideration, of the most catholic conference, to which everybody in this country, every organization in the country which can be presumed by the largest liberty of interpretation to be interested in the subject of copyright, has been invited. The labor has been great. I have taken part in that labor, and I know. There were three conferences of three days each on the preliminary and special work, all under the guidance and competent advice of the Librarian of Congress and register of copyrights, whom everyone knows to have been devotedly and sincerely interested in this matter, and with no bias or prejudice whatever. We have evolved a bill, and the American Copyright League comes to you, as the representative of the chief parties in interest, and asks you to pass that bill in substantially the form in which it is now published.

We do, however, desire to make some suggestions—one important one, and with that exception we believe the bill admirably satisfactory.

The bill has many excellent points. It is the fruit of the mistakes of the last fifteen years. The bill of 1891 was passed in almost the last hours of the last day of the last week of the last month of the last session of that Congress—on March 3, 1891. We have had fifteen years in which to discover the defects of that act, some large, some small, some of which have been remedied since by special acts, as in the case of dramatic copyrights by the extension of one year to foreign authors.

Now we come to you to ask you to place the United States in the front rank of civilized nations in this regard by granting to us the extension of copyright, the main part of which is provided for in this bill.

Mr. CURRIER. Would your league object seriously if the committee should strike out paragraph *b* of section 1, on the first page of the bill?

Mr. JOHNSON. That is:

To sell, distribute, exhibit, or let for hire, or offer or keep for sale, distribution, exhibition, or hire, any copy of such work.

Mr. CURRIER. That is viewed with a great deal of suspicion by many people.

Mr. JOHNSON. I have not had any occasion to discover in that—

Mr. CURRIER. Would you object seriously if that were eliminated?

Mr. JOHNSON. I should have to consider before making any statement about that. I do not see on what ground it is objected to.

Mr. CURRIER. It is objected to on the ground that it controls the sale.

Mr. JOHNSON. Is there any objection to an author controlling the sales of his works?

Mr. CURRIER. It is objected to on the ground that that clause might be given such construction as to prevent a man giving absolute title to a purchaser to make free disposition.

The LIBRARIAN. That it prevents the liberty of resale.

Mr. JOHNSON. It seems to me that that is a question for the Department of Justice. But our attention has not been called to that, and therefore I can not make any declaration in regard to it.

Mr. CURRIER. It is possibly susceptible of that construction. Is it of much consequence to you whether that stays in or not?

Mr. JOHNSON. I confess I am unable to say at the present. I have not considered it. I certainly can not speak in that regard for the league which I represent until it has been considered in its various bearings.

Mr. CURRIER. Will your association kindly give some consideration to that?

Mr. JOHNSON. With pleasure.

Senator SMOOT. Has your association any serious objection to paragraph 7 of section 1 as it now stands?

Mr. JOHNSON. No; we are for that.

Senator SMOOT. Just as it is to-day?

Mr. JOHNSON. Yes, sir.

We therefore desire to emphasize the fact that one of the largest benefits conferred by this bill is the extension of copyright in accordance with the growing usage of the civilized world in respect of literary property. We are very much interested in the reinforcement which this bill brings to the right of the music composer. Am I exceeding my time?

The CHAIRMAN. You have already exceeded your time, but you may proceed.

Mr. JOHNSON. With the consent of the committee, we firmly indorse that part of the bill which reenforces the rights of the music composer, giving him entire control, and we believe that the inclusion of the composer in the full benefits of the copyright law will do for music in this country what similar provisions have done for literature. We are proud of our architecture, we are proud of our artists, we are proud of our growing and already grown literature, and we are proud of such music as has already been produced in this country, but we need a great school of music here. Our musicians are ready to produce it, and it should have the encouragement of the necessary and legal enactments of Congress, and not be subject to the piracy which, before the passage of the law of 1891, did so much to retard instead of encourage.

The CHAIRMAN. Suppose a provision were practically worked out, a royalty provision, opening copyright to all under the same terms, would you object to that?

Mr. JOHNSON. I think that would be entirely destructive of ownership in the property. That is the stamp system, in favor of which, at the time the act of 1891 was being considered, Mr. Gladstone was quoted; but Mr. Gladstone, in response to a letter from Professor Bryce—a letter which I have in my archives—said he was opposed to that—was not in favor of that system.



The CHAIRMAN. But they do not think that is possible in England, because they exclude from these copyright privileges all productions of music by mechanical means.

Mr. JOHNSON. I know nothing of that.

The CHAIRMAN. That is, under recent provisions of their copyright law.

Mr. JOHNSON. I do not know. I must refer you to gentlemen who know all about that.

Mr. PAUL H. CROMELIN. There is a provision in the English act (6 Edward VII, chap. 36) to the effect that the expressions "pirated copies" and "plates" shall not—

for the purposes of this act be deemed to include perforated music rolls, used for playing mechanical instruments, or records used for the reproduction of sound waves, or the matrices or other appliances by which such rolls or records, respectively, are made.

Mr. JOHNSON. I believe that is the bill of Mr. T. P. O'Connor, to which reference has been made, and I ask that that act be made a part of the record.

The CHAIRMAN. All right.

Said English act is as follows:

#### 6 EDWARD VII, CHAPTER 36.

AN ACT To amend the law relating to musical copyright. [4th August, 1906.]

*Be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:*

1. (1) Every person who prints, reproduces, or sells, or exposes, offers, or has in his possession for sale, any pirated copies of any musical work, or has in his possession any plates for the purpose of printing or reproducing pirated copies of any musical work, shall (unless he shows that he acted innocently) be guilty of an offence punishable on summary conviction, and shall be liable to a fine not exceeding five pounds, and on a second or subsequent conviction to imprisonment with or without hard labour for a term not exceeding two months or to a fine not exceeding ten pounds: *Provided*, That a person convicted of an offence under this act who has not previously been convicted of such an offence and who proves that the copies of the musical work in respect of which the offence was committed had printed on the title-page thereof a name and address purporting to be that of the printer or publisher, shall not be liable to any penalty under this act unless it is proved that the copies were to his knowledge pirated copies.

(2) Any constable may take into custody without warrant any person who in any street or public place sells or exposes, offers, or has in his possession for sale any pirated copies of any such musical work as may be specified in any general written authority addressed to the chief officer of police and signed by the apparent owner of the copyright in such work or his agent thereto authorised in writing, requesting the arrest, at the risk of such owner, of all persons found committing offences under this section in respect to such work, or who offers for sale any pirated copies of any such specified musical work by personal canvass or by personally delivering advertisements or circulars.

(3) A copy of every written authority addressed to a chief officer of police under this section shall be open to inspection at all reasonable hours by any person without payment of any fee, and any person may take copies of or make extracts from any such authority.

(4) Any person aggrieved by a summary conviction under this section may in England or Ireland appeal to a court of quarter sessions, and in Scotland under and in terms of the summary prosecutions appeals (Scotland) act, 1875.

2. (1) If a court of summary jurisdiction is satisfied by information on oath that there is reasonable ground for suspecting that an offence against this act is being committed on any premises, the court may grant a search warrant authorising the constable named therein to enter the premises between the

hours of six of the clock in the morning and nine of the clock in the evening, and, if necessary, to use force for making such entry, whether by breaking open doors or otherwise, and to seize any copies of any musical work or any plates in respect of which he has reasonable ground for suspecting that an offence against this act is being committed.

(2) All copies of any musical work and plates seized under this section shall be brought before a court of summary jurisdiction, and if proved to be pirated copies, or plates intended to be used for the printing or reproduction of pirated copies, shall be forfeited and destroyed or otherwise dealt with as the court think fit.

3. In this act—

The expression "pirated copies" means any copies of any musical work written, printed, or otherwise reproduced without the consent lawfully given by the owner of the copyright in such musical work:

The expression "musical work" means a musical work in which there is a subsisting copyright and which has been registered in accordance with the provisions of the copyright act, 1842, or of the international copyright act, 1844, which registration may be effected notwithstanding anything in the international copyright act, 1886:

The expression "plates" includes any stereotype or other plates, stones, matrices, transfers, or negatives used or intended to be used for printing or reproducing copies of any musical work: *Provided*, That the expressions "pirated copies" and "plates" shall not, for the purposes of this act, be deemed to include perforated music rolls used for playing mechanical instruments, or records used for the reproduction of sound waves, or the matrices or other appliances by which such rolls or records, respectively, are made:

The expression "chief officer of police"—

(a) With respect to the city of London, means the commissioner of city police;

(b) Elsewhere in England has the same meaning as in the police act, 1890;

(c) In Scotland has the same meaning as in the police (Scotland) act, 1890;

(d) In the police district of Dublin metropolis means either of the commissioners of police for the said district;

(e) Elsewhere in Ireland means the district inspector of the Royal Irish Constabulary:

The expression "court of summary jurisdiction" in Scotland means the sheriff or any magistrate of any royal, parliamentary, or police burgh officiating under the provisions of any local or general police act.

4. This act may be cited as the musical copyright act, 1906.

Mr. JOHNSON. Before I come to the point of suggesting one or two amendments of slight character, and which I think will not awaken any opposition, I beg permission of the committee to say that the position of the American Copyright League in regard to the non-importation clause relating to libraries has been signally misunderstood, and unfortunately the impression has gone abroad among librarians that we were indifferent and were rather willing to leave it to be fought out between the librarians themselves and the publishers with whom they deal. This is not the case. That misunderstanding arose from the fact that we were willing to leave the question to be discussed first by those two bodies, the librarians and the publishers, with a view to ascertaining what these parties, not the most in interest, but the parties most in contract, would propose. But I wish to say here, on behalf of the American Copyright League, that I am heartily in favor of the broad text of the bill as it stands.

Senator MALLORY. Permit me to interrupt you for a little information. I understand that the provision under subtitle *e*, on page 24, for permission to import one book for libraries and other public purposes is limited to books that have been copyrighted in foreign countries by foreign authors. Is not that the case?

Mr. JOHNSON. No; I think not. I think it is American copyrighted books which are copyrighted also abroad.

Senator MALLORY. That was my first impression, but upon rereading it looks the other way.

But such privilege of importation without the consent of the American copyright proprietor shall not extend to a foreign reprint of a book by an American author, copyrighted in the United States, unless copies of the American edition can not be supplied by the American publisher or copyright proprietor.

That is the provision beginning at line 25 at the bottom of page 24. It seems to me that those two things taken together would imply that the first exception, paragraph *e*, relates to a book that is copyrighted in a foreign country by a foreign author.

Mr. JOHNSON. I do not think that is the object. It is intended to refer back to section 1, is it not? However, I do not care to take up your time. It occurs to me that there is confusion of thought. At any rate, I may have confusion of thought, and possibly it may be my fault. I would like to direct your attention to it for future consideration. I do not think there was any intention in the bill to prohibit the importation of books not copyrighted in this country.

A MEMBER. Why are the authors averse to selling their books when they get a royalty on them? Please explain that objection.

Mr. JOHNSON. For this reason: The value of the copyright depends on the exclusive control of the work. Therefore if the author can not guarantee to the publisher exclusive control for a specified territory in the United States he offers him something of uncertain value.

A MEMBER. I can see how that would hurt the publisher.

Mr. JOHNSON. But it hurts the author also, because he has not a secure market and can not get as good a price for his work. He must at any rate keep faith with his publisher. When the author guarantees his publisher, it is a point of honor with him to furnish the publisher with the exclusive right for his work in the home market.

A MEMBER. You mean he guarantees it where?

Mr. JOHNSON. He guarantees the exclusive right in the American market. If by reason of any act of his there is a situation created by which an Australian edition, a Tasmanian edition, or a Cape Town edition comes into the American market in any considerable numbers, then he has already departed from his agreement with his American publishers. The interests of the two classes are identical.

A MEMBER. I do not see how he departs from duty when it all depends on the law. The author makes a contract with his publisher according to existing law. He does not bind himself not to make a similar or the same kind of contract with an English publisher. He says to the English publisher, "I will sell you this work and you can not only sell it all in England, but can sell extra copies in America." It seems to me that that would tend to enhance the value of his copyright over there.

Mr. JOHNSON. On the contrary, no English publisher would make such a contract with an American author.

Mr. JOHN P. SOUSA. May I explain? I receive copyright statements from my publisher in that country. He furnishes me with a statement of royalties due me on sales in that country that, say, at the end of six months the royalties on sales of my music and books are so much.

Mr. CURRIER. It matters not to you where your music and books are sold?

Mr. SOUSA. No, sir. But I can see that if large numbers kept coming to America it would seriously interfere with the printing trade.

The CHAIRMAN. Have you concluded, Mr. Johnson?

Mr. JOHNSON. I desire to present to the committee two amendments, which are very brief.

The CHAIRMAN. You can put those in the record.

Mr. JOHNSON. I thought it would be due to other gentlemen that public notice should be given.

The CHAIRMAN. Very well, read them, and then we will hear Mr. Page immediately following.

Mr. JOHNSON. We propose to strike out the proviso at the end of section 19, on page 15, beginning in line 20, and insert the following in lieu thereof:

That if such subsisting copyright shall have been assigned or a license granted therein for publication, and if such assignment or license shall contain provision for payment of royalty, and if the renewed copyright for the extended term provided in this act shall not be assigned nor license therein granted to such original assignee or licensee or his successor, said original assignee or licensee or his successor shall nevertheless be entitled to continue to publish the work on payment of the royalty stipulated in the original agreement, but if such original assignment or license contain no provision for the payment of royalty the copyright shall be renewed and extended only in case the original assignee or licensee or his successor shall join in the application for such renewal and extension.

The next amendment we propose is in line 3, page 11, section 14, to insert the words "or periodical" after the words "In a composite work," so that the sentence may read:

In a composite work or periodical one notice of copyright shall suffice.

At the present time it is the custom—whether or not it is upheld by the courts nobody knows—that the Century, Harper's, and all the magazines are copyrighted with one notice, which covers the entire contents. Each magazine may contain, say, 75 articles. If each article required a separate notice, that would mean possibly 150 lines in each magazine, and that would mean in the aggregate the withdrawal of that space from the reader.

A MEMBER. I do not see that it would do anybody any good to have the notice repeated for each article.

Mr. JOHNSON. No; the whole magazine is copyrighted under one notice, and the whole country has become accustomed to it.

One other matter, and then I shall close, and that is the proposed omission from section 20 of everything relating to dramatization. This section provides for the limitation of the right of dramatization and translation to ten years. Whereas it has been thought proper to prescribe a limitation upon the ownership of copyrights, yet certainly there is no sort of precedent for the limitation of ten years for the right of dramatization. The production of a dramatic work is often made at the cost of thousands of dollars. For instance, take Ben Hur, by General Wallace. If that limitation had been operative at the time General Wallace wrote and published Ben Hur, he could never have had any ownership in the dramatization copyright, because it never occurred to him probably that the story had dramatic possibilities, and the extraordinary expense of produc-

ing a work of that kind would have tended to discourage its dramatization. We respectfully submit that that section should be eliminated.

**STATEMENT OF MR. THOMAS NELSON PAGE.**

Mr. PAGE. Without desiring to speak to the general merits of the bill, for myself and for some other of my friends who are authors I feel that we should be very unhappy if any provision were made for copyrighting our works abroad that should interfere with the interests of the publishers on this side. We read, in the newspapers of the day, of the success of American authors abroad and the large amounts of money they make, but I have never happened to meet one who did not say that his contracts with publishers on the other side were little more than a farce, unless he happened to live on the other side.

Once it was said, "Who reads a Yankee book?" I might mention Mr. Warner, now dead, and many others now living, whom I do not wish to bring into this matter; but I can say for myself that my dealings with publishers on the other side have been very disheartening. The first time I wrote a book and had it published I was full of enthusiasm. I was told it was published by an old and well-established firm in London. It happened that I went over there on a visit, and I took occasion to visit those publishers. The title of my book was "In Ole Virginia," and it had a story in it called "Marse Chan." I asked the publisher how it was selling. He said it had not gone very well.

"Have there been any notices?"

"I think so." He rang the bell. The young man appeared, and the publisher requested him to bring in the notices of the book. Presently the messenger came back and said, "No notices of that book." No copies of that book had ever been sent out, and they were awaiting orders. The book had then been out six or eight months. I said I would like to see a copy of it myself. So he brought me a copy.

I may mention that the story I refer to is a negro dialect story, undertaking to celebrate a young Confederate soldier and the fidelity of his body servant, who wrapped the body of his dead master in the flag which he held when he died, and that servant finally brought him home. When the copy of the book was produced, on the back of it was an illustration which was presumed to aid in the sale of it. Marse Chan in that picture was dressed in Union uniform and grasped a Union flag, the flag to which I myself am very loyal, gentlemen, but which Marse Chan at that time was not engaged in defending.

We have here to-day, perhaps, one of the most distinguished authors in the United States, and I would like very much to hear his experience. I can say from my own experience from that day to this that while we are treated with civility by English publishers that is all we get out of them. Personally, I can say that I have been treated with the greatest consideration always by American publishers. A distinguished English author told me not long ago that he considered that the author and publisher were sworn enemies—enemies to the death. That is not the case on this side. An American author who gets a good American publisher is very likely to stick

to him, because that publisher will do much better for him than he can do for himself. The courtesy of magazine publishers and their sympathy for rising young authors and for the writing public generally is such as to be a great stimulus to American authorship, and I think through them they confer a great benefaction upon the American public. If it had not been for the benefit arising from copyrighted books I think there are but few of us who would be here to-day.

I thank you very much.

The LIBRARIAN. As Mr. Bowker and others have indicated, there are other authors here—Doctor Hale and Mr. Howells, and Mr. Clemens is to be here at 4 o'clock. Doubtless some of these would be glad to submit some suggestions to the committee. In the meantime, by way of checking off those whom it might be more convenient to hear now than later, may I ask for the names of any other representatives of the creating class who would like to be heard at this time? The composers are in that group, but, of course, their statements would naturally come in connection with paragraph g. Mr. De Koven applied for fifteen minutes. I believe he is ill and unable to be here but has asked Mr. Walter V. R. Berry, of the District bar, to submit his statement. I assume, though, that Mr. Berry would prefer that that statement should come in at its appropriate time.

I will now introduce Mr. Frank D. Millet, representing the National Academy of Design.

#### STATEMENT OF MR. FRANK D. MILLET.

Mr. MILLET. I will only take one moment. I wish to call attention to the fact that the artists are satisfied with the bill because it helps them in two ways: First, as to the notice which by a compromise, apparently necessary under the circumstances, was reduced in the conferences to the simplest possible identifying mark; second, in regard to the means of securing relief from infringement.

The copyright of the picture is often more valuable than the picture itself. I have taken out copyrights in America of all my important pictures, and I have never made any profit to speak of out of these copyrights. I may confess, as this is a heart-to-heart talk, that since I have never had a picture of mine reproduced in England without my consent, public sentiment being opposed to such a proceeding, I have not yet found it necessary to register a copyright there; but in this country, in spite of the disfiguring notice, nearly every one of my copyrights has been infringed and I have had no redress.

In the bill proposed by the conferences the disfiguration of the notice is very slight; and it consists of a C in a circle or the abbreviation "Copr." placed upon some accessible part of the work of art. The artists object to placing the notice upon a visible portion of the work of art for many reasons, too numerous, indeed, to be explained here. As an illustration I will call your attention to the fact that the photograph miniature or portrait of the wife of any one of us would be comparatively valueless to us if it were disfigured in this way, and yet, according to the present law, unless the notice is placed in full sight on the work of art, anyone, say the reporter of a newspaper,

may kodak the picture and reproduce it and distribute it by the hundreds of thousands. The artists earnestly desire to get rid of the disfigurement of the notice and this the proposed bill practically does.

The LIBRARIAN. How about the date?

Mr. MILLET. We do not want the date at all. We only want to put the required notice in some place where it can be found by a person who cares to find it. We do not see why a person should not write to the artist for information in the case of a picture as well as write to a publisher in the case of a book. By the expenditure of 2 cents a man can find out from me whether my picture is copyrighted or not. That is very simple.

I thank you very much.

**STATEMENT OF MR. W. A. LIVINGSTONE, REPRESENTING THE  
PRINT PUBLISHERS' ASSOCIATION OF AMERICA.**

Mr. LIVINGSTONE. I would prefer to speak to-morrow morning, if agreeable to the committee. I shall not ask more than fifteen minutes.

The CHAIRMAN. I think you had better proceed this afternoon. We have some time. To-morrow morning seems to be engaged.

The LIBRARIAN. Mr. Livingstone, as I understand, desires to emphasize two or three particular points that concern his particular industry, but which would come under criticism in connection with subjects that might be assumed to be more general.

Senator MALLORY. Please state what you represent, Mr. Livingstone.

Mr. LIVINGSTONE. I represent an association known as the "Print Publishers' Association," which has been represented at the various conferences, and which, in a general way, indorses this bill. This association is composed of a majority of the leading print publishers of the country. Its members are primarily engaged in the reproduction of works of art, but some of its members are also engaged in the production of written matter, and some are concerned with commercial advertising. I cite these facts to show that our interests are varied, and consequently within our own membership we have been compelled to study this question from a number of different standpoints.

We are both producers and reproducers, and consequently we have had to do with both sides of that question. The matters I shall speak of are only the several points that have been specifically attacked by written matter filed with the Librarian.

Mr. GILL. You are in favor of the bill as it now stands?

Mr. LIVINGSTONE. Yes, sir.

The objection in the present copyright law to our particular interests have become more and more intolerable until we are suffering very great hardship indeed. The handicap to the American publisher, particularly in our field, is such that we can never hope successfully to compete with the publishing houses abroad unless you give us relief in that field.

This particular bill did not give us all that we want, but it did give finally what we consider the most equitable compromise that is practicable at this time, and therefore we support it.

Mr. GILL. What particular section of the bill do you object to?

Mr. LIVINGSTONE. There are several things. To illustrate, we do not think that notice upon art reproductions should be required at all. We do not think that limitation of action should be restricted to three years. Still, we accept it, because we think it the best compromise that could succeed at this time. There are a number of other details of that kind.

Mr. GILL. How do they affect you?

Mr. LIVINGSTONE. In the case of limitation of action, if you do not discover the infringement—and in our domain that occurs—until after three years, you are estopped by the section relating to limitation.

In the same way, notice of any kind is a very great hardship to us. Notice of any kind is not required in a great many of the leading countries, such as Germany, Austria, Belgium, France, and even England only requires a very limited notice in the single case of engravings. There is no other country, save Canada, which imposes the hardship of notice in the like degree with the United States, and Canada does so on account of her law being modeled upon that of the United States. I can give a number of examples which would illustrate that better, but will not take the time unless you wish it.

Mr. GILL. You may go on in your own way, so far as I am concerned.

Mr. LIVINGSTONE. I wish to give all possible information desired without unnecessarily taking time, of course.

I wish also to point out that in this particular class of property many other countries do not base title to the property upon formalities. A great many of these countries do not require any formalities at all, for example, Germany and France. The result of a copyright law, such as exists at the present time in this country, in which if there is the slightest breach or omission of any one of its technicalities causes confiscation of the entire property, works very great hardship indeed.

We submit that in your consideration of this bill, when any of these points arise, the consideration of the bill should be based upon the protection of that property in the same or in equal degree to other forms of property.

Section 3 is one that we are particularly interested in. That aims to make the copyright protect all forms. I wish to insist that if it does not do so, where you have a plate from which you publish in different forms, you would have to take out a separate copyright for each different form, and sometimes one plate is used in a great many different ways. There are other reasons why we object to any change in this section, and we respectfully refer you to a case which I shall file as a court citation.

Section 5. Some criticism has been made to this section because the descriptions did not specify the particular names of processes. The fact is that we are continually getting out new forms, so that at the time the bill becomes a law we can not give the name of a new process which may be originated very shortly after that time. Also, we make use of secret processes. So you can see that if you required us to name these processes it would result in great hardship to us.

Regarding section 11, which allows thirty days in which to deposit copies, the original law in this country allowed six months to do



that; the time was subsequently reduced to one month, and later it was reduced to ten days, and still later it was cut out altogether. These reductions have always been urged by interests inimical to copyright. A practical case is this: Suppose we are conducting a pictorial news publication; it sometimes happens that the incident we are illustrating happens on the very day the illustration is made and before it is possible to make the deposit in Washington or complete registration.

Mr. GILL. But this bill gives you thirty days.

Mr. LIVINGSTONE. Yes; and we are satisfied with that; but there are others who protest against it. I hope that that feature will be retained.

Now I wish to speak very briefly on the manufacturing clause. There seems to be some desire to extend that beyond the present limitation.

Mr. GILL. Which section of the bill is that?

Mr. LIVINGSTONE. Section 13. This manufacturing clause removes the limitation existing on certain classes. The present law requires that a negative, to obtain copyright, must be made within the limits of the United States. The ostensible purpose of that particular clause was to help the American photographic manufacturing houses, but, as a matter of fact, it had just the contrary effect, for this reason: It limited their operation entirely to this country. There are frequent instances where you can not take the negative within the United States, such as of a painting in a foreign gallery, or of the architecture of a foreign building, or of some scientific phenomena occurring without the country, and the American publisher can get no protection in such case. As a result, he does not undertake the expense of procuring the negative, and thus we are shut out of that field. Therefore we protest against any extension of the manufacturing clause beyond the provision now existing in the bill.

Mr. GILL. The provision of the pending bill will meet that objection?

Mr. LIVINGSTONE. It does; subject to that, yes.

The CHAIRMAN. As I understand, you are satisfied with this bill?

Mr. LIVINGSTONE. Yes, sir.

The CHAIRMAN. You are simply answering certain objections?

Mr. LIVINGSTONE. We are simply wishing to protest against those objections and citing one or two examples.

There is another point which is of the utmost importance to us and which has been alluded to—the question of “notice.” Aside from remedies for infringement there is no subject of so much importance to us as that of “notice.” This matter is one that bears with peculiar hardship on the art interest and the print publishing interest. You do not find anybody objecting to buying a book because there is a notice of copyright in the book. You frequently find purchasers of works of art, either original or reproductions, sometimes declining to buy the original or the copy simply because there is notice on it. I could cite many practical difficulties resulting from that. Not only does this notice affect us in a commercial way, but it debars us from procuring subjects we could otherwise get, because the artist will not submit to the present exactions.

We also refer particularly to the provision that has been introduced by which if a copy gets out inadvertently without notice you

are asked not to take away the entire copyright of the property or confiscate it. When you are arranging to print the book you can have your printer put the notice in the proper place and it generally goes through the press without difficulty. But we manufacture many kinds of prints which you can not put through a printing press, and the notice has to be put on by dies afterwards, so that in order to take care of the notices now required we have to have a number of dies. These are sometimes printed or impressed in small quantities at a time, and if the wrong die is pulled out the copyright is extinguished altogether. If we send out an unmarked copy or a defective copy without that mark we concede that the innocent infringer should not suffer for it. But we protest against that particular thing, shutting off all recourse against other people who are advised of our rights and have had full notice and yet take advantage of that technicality to infringe with impunity.

The LIBRARIAN. Have you anything to say on the question of damages?

Mr. LIVINGSTONE. I wish to point out that by section 23 the statutory damages for reproduction of works of art are reduced one-half in the maximum. They are now \$10,000, and this section limits it to \$5,000. The operation of the present law is such that for 90 per cent of the infringements there is no effective remedy at all. The result is general contempt for the law in our particular domain. Those people who are opposed to this change of the law have in many cases come to feel that by their appropriations they have secured vested rights, and consequently are much disturbed when an effective remedy is proposed.

In that connection I wish to point out the great difficulty in measuring damages for infringements of our class of property. Where there are reproductions in composite works it is almost impossible to segregate the part that is contributed by the infringement from the balance of the composite work. You can not effectively do that, and in most cases you can not do it at all. In any case it is done with greatest difficulty. Also, many cases arise in which you can not adequately measure the damages in court.

These provisions are no innovation on the existing law. They exist in several other branches of the law.

Mr. CURRIER. You are satisfied with section 23 as it stands?

Mr. LIVINGSTONE. Yes, sir.

As to publication: We wish to protest particularly against any definition of the word "publication" which would render a work of art published before the first authorized vending or the first authorized public distribution of the work. A great deal of trouble has come from the present state of confusion.

Mr. CURRIER. How would you define that word "publication," or is that definition satisfactory as it stands in the bill?

Mr. LIVINGSTONE. It is satisfactory in intent, but I think there is one little defect which should be corrected. If you will turn to section 63, line 5, on page 39, before the word "distribution," we would suggest the insertion of the word "public," because there is sometimes a private distribution, or a limited distribution.

In the seventh line, after the word "sale," we would suggest the insertion of the words "or publicly distributed," because sometimes subjects are publicly distributed and are still never placed on sale.

There is one other point involved in that matter of publication, and that is, exhibition of works of art. Even under the existing law exhibition is not necessarily publication, as has been construed by the courts. We think that while an attempt to define the word "publication" as a whole would be very difficult, yet a definition of the date of publication is very easy, and this section, as it would read with these proposed amendments, would make a perfectly safe line of demarcation which anybody could understand and which would avoid many of the troubles now existing. We protest strongly against exhibition being considered in any sense as publication, and on this point we are prepared to give you practical examples, to give you extracts from court decisions, and anything else the committee may desire bearing upon the question, if there be serious doubt. We do not want to take up time unless there be serious doubt.

There are two other points I wish to allude to, and the first is merely to show how easy it is for people to come here with honest intentions and yet really misstate the facts. Here is an illustration: On page 135 of your hearings in June appears the following:

In section 5, paragraph (h) should be eliminated. This paragraph was intended to cover perforated music sheets or talking-machine records, which are to be otherwise provided for. As to other matters, it may be said that if the reproductions referred to are copies of things already copyrighted, they are infringements; if not copies, they are works of art in themselves, under paragraph (g) of section 5.

The statement is that that paragraph was intended to cover perforated music sheets.

The LIBRARIAN. I want this point to be clear to the committee. In the criticisms submitted by Mr. H. N. Low there is the criticism of a specification under section 5 as a class for registration. Section (h) is "Reproductions of a work of art." Now, Mr. Low proposes that that should be struck out, and he said it was intended to cover mechanical reproductions of music. Mr. Livingstone, as a print publisher, wishes to submit a different view. I can not recall that in the conference that word "reproduction" was advanced in the interest of music provisions at all, nor did I recall that it was advanced in the interest of print publishers.

Mr. LIVINGSTONE. The statement in this paragraph is that this paragraph was intended to cover these reproductions. As a matter of fact, that word "reproduction," as used in this bill, originated entirely from the graphic reproducing interests. When it was first put in the original bill, of which the present bill is the final evolution, nobody dreamed, so far as we know, that it included perforated music rolls or musical reproductions of any kind. A certain lithographic interest insisted from the beginning that the reproductive rights on graphical work should be kept distinct from the rights upon the original itself. The gentleman who made the statement before you in the hearing in June therefore makes an assertion which is not only misleading but absolutely false.

Mr. CURRIER. Could not that be remedied by striking out section (h), in regard to reproductions?

Mr. LIVINGSTONE. You will find that there is another reason for retaining it. There are different terms of copyright for different kinds of property. You will find that an original work of art has term of copyright and that a reproduction of a work of art has

another term, a reduced term. The evolution of that section 5 was one extending over a year, and its present form was finally worked out by a conference between the representatives of the two bar associations and others concerned. The point is that this particular case is typical of a number of other cases in which people have been misled into stating things not true.

Mr. CURRIER. Three or four words would remedy that.

Mr. LIVINGSTONE. It is all right as it is.

Mr. CURRIER. Just exclude the reproduction of music by mechanical means.

Mr. LIVINGSTONE. Yes, sir.

A statement was made to you that the extension of the limitation of action from two to three years was greater than that in the patent law. The limitation of action in the patent law is six years.

We respectfully, but very earnestly indeed, wish to ask this caution: This bill is a very condensed bill. The process of its evolution was such that it is now boiled down to perhaps one-third of its original size. There is hardly a provision in it which does not affect almost every other provision of the bill, so that you can not disturb one without running the risk of serious disturbance of another. You may taken one section of the bill and amend it with reference to the musical interest if you like and have no idea of affecting the art interests or the print-publishing interests, and yet it may very seriously change or affect those interests by reason of this interdependence of the different sections. May I make the request, if you should hereafter decide to change the form, that we at least be allowed to see the new form and submit objections if we desire. I am referring to the bill as a whole. We would not wish to have it crystallized after change without a previous opportunity being offered to us to object or criticise.

The CHAIRMAN. We could not very well promise that. We shall probably not agree upon the form of the bill until very late in the session. The bill may be largely rearranged in committee.

A MEMBER. And it may be rewritten in the House.

Mr. LIVINGSTONE. I only wish to emphasize the importance of this interdependence of the different sections and the danger of making change in one section without a due consideration of its effect upon other sections.

The CHAIRMAN. The committee will make every effort to guard it.

*Memorandum of the Print Publishers of America.*

*To the honorable the Joint Committee on Patents of the Senate and House of Representatives:*

GENTLEMEN: The Print Publishers' Association of America includes a majority of the leading print publishers. Primarily their business is publishing works of art, but some also produce both written and pictorial matter, while others are concerned with commercial advertising. We are manufacturers as well as publishers and a number of our members operate their own factories.

These facts show that our interests are varied and that we have been compelled to study the equities of copyright from a broad and not a narrow point of view. Being both creators of original works and reproducers of the works of others, we have a practical appreciation of both sides of the question and of the troubles and inconveniences that will be caused by the proposed changes in the law. We produce works in etching, engraving, lithography, photography, gravure, and some secret processes. We are therefore interested in protecting all processes.

The conditions of operating under the present law have become more intolerable every year. The handicap to the American art publisher is such that he can never hope to successfully compete in certain fields with his foreign rivals until such conditions are ameliorated.

The proposed bill does not give us all we want, but it is such a great advance over existing law that we are glad to support it. We believe it to be the most equitable compromise between conflicting interests which is practicable at this time.

The only suggestions we submit as to changes are those of phraseology for the purpose of making the intent more clear. They are contained in the attached memorandum "B."

Certain sections of this bill in which the owners of artistic property are vitally interested have been criticised. We therefore wish to briefly allude to them.

We believe that consideration of this bill should proceed on the principle that intellectual property has an equal claim with physical property to the protection of the law and that its enjoyment should not depend upon the absolute observance of formal technicalities, the most trifling breach or omission of which results in confiscation. We call attention to the fact that no civilized country, save Canada (whose laws were modeled upon those of the United States), makes copyright dependent upon formalities in like degree with the United States. Many leading countries dispense with formalities altogether. Even when all initial formalities are complied with, the American publisher continues to hold his property in constant peril.

#### SECTION 3—*Copyright protects copies.*

This section has been questioned as an extension of existing law. We think that it only makes existing rights more explicit. Clearly, unless the copyright upon a work follows and protects all reproductions or copies thereof in any form or style, inextricable confusion must result and the object of the law would fail of accomplishment. For a clear exposition of the necessity of such principle we respectfully refer you to the case *Schumacher v. Schwencke* (30 Fed., 690). (See "A" attached.)

#### SECTION 5—*Subject-matter.*

Criticism is made because this section does not include specific terms for the different works but new processes are invented from time to time and manifestly these can not be included before known. Neither can secret processes be conveniently described, and there is not only hardship, but decided danger unless only general inclusive terms are used.

#### SECTION 11.—*Time for deposit.*

Objection is made to the thirty days of grace allowed for deposit. The original law gave six months, which was subsequently reduced to thirty days, then to ten, and then omitted. These reductions have always been urged by interests inimical to copyright who wish its conditions as exacting and technical as possible. When deposit is required in other countries (and in many it is not) the time of grace varies from one month to a year. In the case of books, it is almost always possible to arrange for the deposit of proofs at least on or before publication. There are prints, however, in which such arrangement is impossible. An easily understood case is that of a pictorial news service in which the prints have to be published the day on which the event occurs and earlier than it is possible to make registration or deposit in Washington. Copyright upon some works is consequently lost because of the impossibility of complying with the law in time.

#### SECTION 13.—*"Manufacturer's clause."*

Existing law requires that to obtain copyright upon a photograph it must be printed from a negative made within the limits of the United States. The proposed law removes this embargo and allows copyright upon negatives taken anywhere. The ostensible reason for making the negative within the United States was to protect American photographic manufacturers. As a matter of fact it had just the contrary effect for it practically confined their operations to this country. When they sent their men to take negatives outside of the country, such negatives, even though brought into the country and solely printed within

the limits of the United States, were denied any protection whatever. Many negatives on account of the location of the subject can only be made outside the limits of the United States. To illustrate: Paintings in a foreign gallery, the architecture of a foreign cathedral, and scientific observations of phenomena not occurring in this country. The lack of protection upon such negatives makes it impossible in most cases for the American house to undertake the expense. The result is that foreign competitors who are protected in all countries subscribing to the Berne Union reap the benefit. Similar examples can be cited in other forms of medium. We wish to point out that reproductions of art works have limitations distinctly different from literary work. An American print house reproducing extensively the galleries of Europe is unknown. We earnestly urge that no extension of the manufacturing restrictions be made beyond those already included in the bill.

#### SECTIONS 14 AND 15.—“Notice.”

Except the question of effective punishment for piracy, nothing is of more importance to us than the question of “notice” upon the copyright property. Why should unmarked intellectual property be treated as abandoned to the public any more than a man’s overcoat without his name on the sleeve? Outside of Canada, no other country in the world compels the drastic notice requirements of the United States. In the majority of cases they require no notice. Where they do, it is of a very limited character. France, Germany, Austria, Italy, and Belgium require no notice upon artistic works. England only requires marking in the single case of engravings, and then simply the name of the manufacturer, as the result of an obsolete law. In no other class of copyright property is the question of notice so great a hardship, nor one in which its use affects to the same extent the commercial value of the subject. Probably no bookseller ever had a customer decline a book because there was a copyright notice in it. The art dealer not infrequently has customers decline both the original work and also the reproduction because of such notice. Aside from the defacement and the great difficulty of applying it in certain cases, it has a direct effect upon the commercial value of the subject. Notice such as the United States requires is considered a barbarism in most foreign countries. Many artists will not submit to it, and the American publisher who wishes to operate under our copyright laws is therefore debarred at times from subjects he wants, and finds his field restricted as compared with his foreign competitor. Even under the present law, the United States court of appeals recently affirmed that the framers of the present law had no intention of compelling notice upon original works of art. This is no new principle even to the present statutes. They recognize the difficulty of applying notice to works of art and the defacement and impairment of value from such application. They therefore allow inscription of notice upon the mount, and in such cases as molded decorative articles, upon the back or bottom. We strongly protest against any abrogation of these rights.

The practical difficulties of dealing with “notice” in works of art are without number. To illustrate: The methods of manufacture of certain kinds of prints make it impossible to imprint a uniform notice as can be done upon the title-page of a book. Often notices have to be applied individually by dies or otherwise after the print is finished. By inadvertence, even with the utmost care, a whole copyright has been lost because a single copy escaped without mark, or because the wrong copyright die was used. Many prints have to be sold unmounted. To reduce defacement as much as possible, the notice must be printed near the edge of the print. The ordinary operations of mounting and trimming will sometimes cut off the notice. These are dangers from which other publishers are practically exempt. If a single defective print escapes, the proprietor is punished by the destruction of his whole copyright. Nothing he can do will reinstate it, and even those who have ample notice of his rights can pirate with impunity.

The reasons for omitting dates and otherwise condensing “notice” are to reduce the defacement as much as possible, to reduce the number of notices required on a single article, and to make its application more simple and safe. The notice provided gives ample warning that rights are reserved, and if an individual wants a complete abstract of title of the property, he can apply either to the owner or the Copyright Office. If every country were to require “notice” like the United States in its own phraseology, the face of a work of art, in order to get protection in all countries, would be fairly covered with the different notices exacted.

We submit that if "notice" is to be a requirement, we are entitled to ask that such requirement be made as little burdensome as possible. When an unmarked work escapes through our fault, we concede that an innocent infringer should not suffer, but we earnestly submit that it is most unjust that this should allow a willful pirate who has notice of the copyright to injure the property with impunity.

Some of the very interests who are most tenacious about notice are the very ones whom it is most difficult to make imprint notice when they buy reproduction rights from us. There are cases without number where they agree to imprint the notice required by law, and on their reproduction they either omit it altogether or mutilate it by leaving out the date so that it will not comply with the law.

#### SECTION. 23.—*Protection of copyright.*

The statutory damages provided by this section for infringements of reproductions of works of art reduce the maximum from \$10,000 to \$5,000. Under the present law it is notorious that there are no effective remedies for piracy in 90 per cent of the cases that arise. In our own domain recoveries are so rare that general contempt of the law exists. In infringements of artistic property considerable has been said about the enormous damages to which an infringer is liable. As a matter of fact, we know of only one case in which a print publisher has ever been awarded the maximum, and he has yet to collect it from the defendant, while we do know by personal experience of hundreds of cases which have not been prosecuted because of the inefficiency of the law. The impunity with which the present law can be violated has encouraged infringements in this country to such an extent that many of the infringers have come to look upon their appropriations as vested rights. Naturally they are disturbed when effective remedies are proposed.

Nor should we leave this section without suggesting a most important point. The very nature of copyright property is such that many cases arise in which it is impossible to adequately measure the damages. If the infringement occurs in a composite work, to which there are other contributing factors, the impossibility of clearly dividing the results from each component part is obvious. The difficulty of proving with definiteness actual pecuniary damages sustained has been recognized and Congress has frequently provided statutory rates of compensation. This has been approved by the Supreme Court. (See *Brady v. Daly*, 175 U. S., 148.)

The civil remedies provided are only such as the nature of the property requires. There is no innovation on existing law. The recovery of damages and profits has been severely criticised as unprecedented, but a like provision has existed in the patent law for many years (Rev. Stat., sec. 4921) and has also been incorporated into the trade-mark law (33 Stat., 274.) The provision that the infringer must prove his cost is only a sensible application of the "best evidence" rule.

#### SECTION 63.—*Publication.*

We protest against any definition of either the word "publication" or the phrase "date of publication" which might render a work of art published before any authorized vending or public distribution of copies of the work. Exhibition should not be construed as publication. Paintings are frequently exhibited in galleries and elsewhere before arrangements can be made for copying them. The United States court of appeals, even under the present law, has decided that exhibition is not necessarily publication. The only safe point of demarcation for the date of publication is the date upon which authorized vending or public distribution of the copies commences. Any other rule produces injustice and confusion. If publication commences before the date specified in the bill, then artists will be compelled to copyright their works before daring to show them to the public in any way. Such a condition would, as it sometimes does now, cause the loss of the copyright.

We have not gone into full detail of the reasons for maintaining these sections intact, but if necessary, we will gladly furnish a memorandum of such reasons, reenforced by practical examples and court decisions.

Respectfully submitted.

PRINT PUBLISHERS' ASSOCIATION OF AMERICA.  
W. A. LIVINGSTONE, *President*.  
BENJAMIN CURTIS, *Secretary*.

DECEMBER 4, 1906.

[Memorandum A.]

COPYRIGHT FOLLOWS AND PROTECTS EVERY REPRODUCTION OF THE ORIGINAL.

As there are conflicting opinions on this point, it is necessary to plainly affirm this principle in the law.

*Schumacher v. Schwencke* (30 Fed., 690).

The owner of a copyrighted painting by publishing lithographic copies thereof does not lose the right to restrain others from copying these copies. (Syllabus.)

"Although the precise question here involved does not seem to have been the subject of judicial decision, it is thought that unless the intent and purpose of the statute are to be rendered nugatory, but one answer is possible." \* \* \*

"The complainants' copies have the notice required by law printed thereon. It would be a strained construction to hold that the statute only protected the sale of copies made in precisely the same manner as the original. It will hardly do to say that a water color is not infringed by an oil or a crayon or a lithographic facsimile. The statute is not so technical. Its design is to give substantial and not merely a fanciful protection. If the contention of the defendants is well founded, the complainants gained nothing by their copyright. The moment they sought to avail themselves of the advantages of the statute by the sale of copies, that moment they lost the only right which was of value. It was abandoned to the public. Thus construed, the law becomes a mere abstraction, affording in cases like this no protection whatever. It by no means follows from the fact that the law recognizes a distinction between a painting and a print that a copyright for the former will not protect its owner in the sale of copies thereof even though they may appropriately be called prints. It is clear that the defendants are wrongdoers. They have invaded the complainants' territory. They have copied the painting. It is immaterial how this was accomplished, whether directly or indirectly. They have copied a lithograph which was protected by the complainants' copyright, and have thus attempted unlawfully and without due recompense to reap the fruits of the complainants' genius and enterprise."

This is in accord with *Lucas v. Williams* (2 Q. B., 113). *Champney v. Haag* (121 Fed., 944) holds to the contrary.

## RECOVERY OF PROFITS AND DAMAGES IS NOT AN INNOVATION.

Revised Statutes, section 4921 (as amended 1897):

*"Power of courts to grant injunctions and estimate damages.*—The several courts vested with jurisdiction of cases arising under the patent laws shall have power to grant injunctions according to the course and principles of courts of equity to prevent the violation of any right secured by patent on such terms as the court may deem reasonable; and upon a decree being rendered in any such case for an infringement the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby; and the court shall assess the same or cause the same to be assessed under its direction. And the court shall have the same power to increase such damages in its discretion as is given to increase the damages found by verdicts in actions in the nature of actions of trespass upon the case. But in any suit or action brought for the infringement of any patent there shall be no recovery of profits or damages for any infringement committed more than six years before the filing of the bill of complaint or the issuing of the writ in such suit or action, and this provision shall apply to existing causes of action."

4 Sutherland on Damages (section 1189):

"As has been stated, the present patent law gives to the successful plaintiff in an equity suit for an infringement the damages which he has sustained in addition to the profits to be accounted for by the defendant. As interpreted, this statute does not in every case entitle the plaintiff to such damages, but only when they are necessary to give him adequate compensation. If it appears that the injuries which he sustained are greater than the gains and profits realized by the defendants, the plaintiff is entitled to recover compensation in the form of damages for the excess of the injuries sustained beyond the gains and profits received by the defendant."



*Coupe v. Royer* (155 U. S., 565) :

"The measure of recovery in a suit in equity for such infringement (of patent) is the gains and profits made by the infringer, and such further damage as the proof shows that the complainant sustained in addition to such gains and profits."

STATUTORY DAMAGES ARE LEGAL AND APPROVED BY THE COURTS.

*Brady v. Daly*, 175 U. S., 148, is a very recent decision of the Supreme Court enforcing the statutory damages of the dramatic section (4966) and discussing such damages historically and on their merits. We quote from the opinion (at 154) :

"The idea of the punishment of the wrongdoer is not so much suggested by the language used in the statute as is a desire to provide for the recovery by the proprietor of full compensation from the wrongdoer for the damages such proprietor has sustained from the wrongful act of the latter. In the face of the difficulty of determining the amount of such damage in all cases, the statute provides a minimum sum for a recovery in any case leaving it open for a larger recovery upon proof of greater damage in those cases where such proof can be made. The statute itself does not speak of punishment or penalties, but refers entirely to damages suffered by the wrongful act. The person wrongfully performing or representing a dramatic composition is, in the words of the statute, 'liable for damages therefor.' This means all the damages that are the direct result of his wrongful act. The further provision in the statute, that those damages shall be at least a certain sum named in the statute itself, does not change the character of the statute and render it a penal instead of a remedial one. The whole recovery is given to the proprietor, and the statute does not provide for a recovery by any other person in case the proprietor himself neglects to sue. It has nothing in the nature of a *qui tam* action about it, and we think it provides for the recovery of neither a penalty nor a forfeiture."

SUCH DAMAGES ARE ENFORCED WHEN PLAINLY PROVIDED BY LAW.

*Bolles v. Outing Co.*, 175 U. S., 262, contains language which is very suggestive under the present circumstances: The court is discussing section 4965 of the present law (at 265) :

"The statute, then, being penal, must be construed with such strictness as to carefully safeguard the rights of the defendant and at the same time preserve the obvious intention of the legislature. If the language be plain, it will be construed as it reads and the words of the statute given their full meaning; if ambiguous, the court will lean more strongly in favor of the defendant than it would if the statute were remedial. In both cases it will endeavor to effect substantial justice. \* \* \*

"Had Congress designed the extended meaning claimed for these words 'found in his possession' it would naturally have used the expression 'found or traced to his possession' or 'found to be or to have been in his possession.' It is only by interpolating words of this purport that the statute can receive the construction claimed."

*Litho. Co. v. Werckmeister* (C. C. A. 2d), 146 Fed., 377, illustrates the difference under the present law between recovery for infringement of a book or photograph and of a painting and shows how exactly the courts will follow the precise language of an act of Congress.

"The complainant alleges a sale of 30,100 copies of the copyrighted painting. None of these were found in the possession of defendant at the time of beginning action, under any process or otherwise. Defendant insists that for that reason the plaintiff failed to show facts sufficient to sustain recovery. Reliance is had on the decisions in *Thornton v. Schreiber*, 124 U. S., 612, and *Bolles v. Outing Co.*, 175 U. S., 262. In both those cases the copyrighted article was a photograph. Defendant's counsel suggests that there is no reason apparent why there should be one measure of damages in the case of a book or photograph and another in the case of a painting but it is a sufficient answer to such suggestion to note that the statute makes just such a distinction. In the case of a book or photograph the offending person shall forfeit 'one dollar for every sheet found in his possession, either printing, printed, copied, published, imported, or exposed for sale.' In the case of a painting

he shall forfeit 'for every copy of the same in his possession, or by him sold or exposed for sale.' In the one case it will be noted that there is to be no penalty for any copy 'sold;' in the other case a penalty for every copy 'by him sold' is to be exacted. The structure of the sentence is conformed to this distinction. In the earlier quotation the words 'found in his possession' qualify every subsequent word in the clause; in the latter quotation the words 'in his possession' are cut off from the next succeeding words 'by him sold' by the use of the word 'or.' It is not necessary to inquire why this distinction is made; it is sufficient to say that it is made, in language so plain that to eliminate it would be judicial legislation."

## EXHIBITION IS NOT NECESSARILY PUBLICATION.

It is essential to have a clearly defined and easily applied rule to determine "date of publication" of works of art.

Werckmeister v. Company, 134 Fed., 321:

(323) "A copyright is an incorporeal right to print and publish. \* \* \* This property is a different and independent right from the corporeal property out of which it arises. \* \* \*

(324) "Publication of a subject of copyright is effected by its communication or dedication to the public. Such a publication is what is known as a 'general publication.' There may be also a 'limited publication.' The use of the word 'publication' in these two senses is unfortunate and has led to much confusion. A limited publication of a subject of copyright is one which communicates a knowledge of its contents under conditions expressly or impliedly precluding its dedication to the public \* \* \*."

(326) "It is not perceived how the legal status of a right of copyright in a painting or statue, so far as concerns their publication, can be distinguished from that of lectures or dramatic compositions. In fact, such distinctions as may be suggested only serve to strengthen the presumption of limited publication in favor of the work of art. There the author may wish to enjoy the profit from exhibition of the original and from the right to publish copies, but his chief object often is to secure the profit arising from the sale of the original work. The exhibition of a work of art for the purpose of securing a purchaser or an offer to sell does not adversely affect the right of copyright, and from the fact that the right protected by statute in a work of art is that of copying and not of exhibiting is derived the general rule that the mere exhibition thereof is not a general publication. (Drone on Copyright, 287.) There may be a sale of the subject of copyright separate and distinct from the sale of the copyright therein. (Stevens v. Cady, 14 How., 528.) In a limited exhibition, as of a play, there is no dedication to the public, no presumption or recognition of a right to copy, and therefore no abandonment of said right."

## [Memorandum B.]

*Suggested amendments to bills S. 6330, H. R. 19583, by the Print Publishers' Association of America.*

## SECTION 3.

At the end of this section add, "The copyright upon composite works shall give to the proprietor thereof all the rights and privileges in respect thereto which he would have if each subject were individually copyrighted under this act."

## SECTION 11.

At the end of line 20 of the Senate bill, after the words "best edition," add the words "then published." This will make the required deposit "two complete copies of the best edition then published."

## SECTIONS 21 AND 22.

In the first line of each section, before the word "consent," insert the word "written," and in the second line of each section cut out the words "author or."

## SECTION 63.

In line 5 insert, before the word "distribution" the word "public." In line 7 add after the word "sale" the words "or publicly distributed."

THE PRINT PUBLISHERS' ASSOCIATION OF AMERICA,  
*Detroit, Mich., December 15, 1906.*

Dr. HERBERT PUTNAM,  
*Librarian of Congress, Washington, D. C.*

DEAR SIR: We understand an amendment to section 13 of the proposed copyright bill will be handed in by the Typographical Union for the purpose of extending the requirements of American manufacture to other component parts of the book than that of the text. Without seeing such amendment, we of course can not judge of its scope, but we feel it necessary to protest against any extension of the manufacturing clause which would carry its restrictions beyond the text of the book, and which is already covered by section 13.

We have shown how certain kinds of photographs can not be made within the limits of the United States because the objects to be photographed are not contained within the country. The base of every photogravure which is manufactured, whether it be a gelatin or a copper plate gravure, is a photographic negative. Equally, therefore, a gravure which is intended to reproduce paintings abroad or foreign architecture or foreign scenes can not be wholly manufactured within the limits of the United States. The original photographic negative from which the work is started must be taken where the object is. If the requirement of complete American manufacture for all the contents of the book is imposed, copyright would be denied to books containing reproductions of this kind.

Copies of original works of art can only be made successfully where the original is. The services of certain etchers or engravers, which the American public wish, can only be obtained abroad. Sometimes these people are specialists in their particular line and the only ones from which that particular form of expression can be obtained. If the manufacturing restriction were extended to include all the illustrative plates of the book as well as the text plates, then the inclusion of a single plate made abroad by such a specialist would deny American copyright to the whole book, even though all the other parts were made within the limits of the United States. The inclusion of a mezzotint or an etching by a famous foreign artist would be fatal. Are all American books to be limited to American art only more than all American musicians are to be limited to American music?

The effect of the extension of this manufacturing restriction into the fields of art reproduction instead of giving increased protection to the American manufacturer in the majority of cases would have a contrary effect, and it could not fail to greatly restrict the fields in which American houses would publish. We are speaking as manufacturers as well as publishers, and we consider any such extensions as detrimental to our interests. Copyright protection in England to American-made art reproductions is becoming increasingly desirable and is a protection we are now denied. The extension of the manufacturing restriction to such productions would be certain to interfere with our getting the relief and protection we desire in that country.

If such amendment is filed, therefore, we respectfully request that this protest against its adoption be included in the record.

Very respectfully,

THE PRINT PUBLISHERS' ASSOCIATION OF AMERICA.  
 W. A. LIVINGSTONE, *President.*

DETROIT PUBLISHING COMPANY,  
*Detroit, Mich., December 15, 1906.*

Dr. HERBERT PUTNAM,  
*Librarian of Congress, Washington, D. C.*

DEAR SIR: I have just received a copy of the letter of the American Newspaper Publishers' Association protesting against the proposed copyright bill in certain particulars. I inclose herewith a letter to the Joint Committee on Patents in reply to such protest by the newspaper publishers. As their protest is to be included in the printed record, we respectfully request inclusion of our reply in the record also, that their communication may not appear

In the record uncontradicted. If it is to be brought to the attention of either or both of the chairmen of the committees, will you kindly have the necessary action taken? Had we known about this protest in time, we would have asked to speak in reply to it.

Yours, respectfully,

W. A. LIVINGSTONE.

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DETROIT PUBLISHING COMPANY,  
*Detroit, Mich., December 15, 1906.*

DR. HERBERT PUTNAM,  
*Librarian of Congress, Washington, D. C.*

DEAR SIR: Through misunderstanding a telegram I sent, I found on my return home that the examples of little prints in which the copyright notice would be covered by the mat used to protect the print, but in which such notice would be perfectly accessible to any person wishing to examine the print for such notice, had not gone to you. I am sending them to you by express, under separate cover, to-night.

In this connection the question may arise why the uncovered back of the mount would not be sufficient. The reply to that is that the little prints are more often than not stripped out of the mount altogether and then put in little close metal frames or similar holders and the original mount thrown away by the art dealer. Of course, if the notice were confined to the mount it would be lost from the print.

I can send down a sample of the miniature, which is a still better object lesson, but these miniatures are pretty valuable, and I hesitate to do that unless it is absolutely necessary.

Yours, respectfully,

W. A. LIVINGSTONE.

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THE PRINT PUBLISHERS' ASSOCIATION OF AMERICA,  
*Detroit, Mich., December 15, 1906.*

THE JOINT COMMITTEE ON PATENTS,  
*Washington, D. C.*

GENTLEMEN: We have just seen for the first time a copy of the protest, dated December 6, by the American Newspaper Publishers' Association against the proposed copyright bill. Manifestly, we could not make any reply to such protest before seeing it, and we therefore respectfully request the inclusion of this letter in the printed record.

In general their protest is directed against photographic copyright.

We respectfully submit that if copyright is to be given to photographic property at all, there can be no good reason advanced why the law should specifically single out this class of copyright property as against all other kinds and give it a limited protection or a protection with reservations; that any provision which would make any kind of copies of a photograph not an infringement and not punishable must of necessity give to the copyright proprietor of such property a limited control instead of an exclusive control of his property; that such discrimination would not only be unjust, but in practical cases daily arising would cause decided hardship in some cases and in others would lead to suppression of the work altogether.

To answer the first point contained in their protest: It is true that there are many photographs of comparatively little value, but it is equally true that there are numerous literary, artistic, and musical compositions of practically no value. If, therefore, this reason is a good one for restricting copyright on photographs, it is equally good reason for restricting copyright upon literary, artistic, musical, and dramatic compositions. As in these other classes of property, however, there are many kinds of photographs and photographic reproductions in which the cost and value of the work is just as great and the damage from infringement just as serious as that of any other class of property. Example: An artist who sells the right of reproduction of his painting charges the photographic manufacturer or publisher just as high a price for his copyright rights as he does an etcher or an engraver or any other reproducer. He demands from the photographic publisher just as stringent a contract in having his original and the photographic copies thereof protected

against infringement in newspaper and any other form as he does from the etcher or engraver.

If your committee should make any distinction or difference between photographic reproduction and an engraving or etching reproduction, it would mean that the photographic reproducer, no matter if he were using the finest type of carbon photograph, would shortly be discriminated against by the artist in favor of the etcher or engraver. The photographic reproducer in this country would be driven out of the field and the foreign photographic reproducing house, which gets absolute protection abroad, would shortly preempt the entire field in this country as well as others where they are protected. Or, again: The cost of obtaining photographs of certain kinds of physical and scientific phenomena is as great and sometimes greater than the cost of production of an ordinary book. Part of the value and possibility of recompense for use of such subjects is the reproductive use in magazines and newspapers. The damage in such cases is just as real, just as harmful and decided as the damage incurred through the infringement of a short story in a newspaper or magazine. It will not do to say that because some unimportant kodak picture is not seriously injured by reproduction that all other photographic pictures must submit to infringement with impunity. As a matter of fact, not 1 per cent of the photographs taken are copyrighted at all, and nobody copyrights a photograph unless he believes there is certain value to him in its exclusiveness. The other 99 per cent are free to the newspapers.

Moreover, photographs of little or no intrinsic value are sometimes copyrighted for the express purpose of securing privacy. The damage to the photograph by publication may be nil, while the real injury to individuals from such publication may be very serious.

The second point urged is that the imperfect reproduction or imitation in a newspaper should not be made an infringing, damage-producing copy, subject to a penalty. If there is a question as to whether damage is caused by such infringement, surely the men who create the photographic property and spend their time and money in its production and sale are better judges of whether they sustain damage than the newspaper publishers who wish to appropriate the property for their particular uses without any compensation for it. As a matter of fact, very serious damage frequently results from this use. Certain artists, both in this country and abroad, will not permit reproduction in any form of their paintings in this country because of the ease with which newspapers may infringe such copies and escape punishment for such infringement. Photographic houses reproducing large numbers of subjects frequently keep certain divisions of their subjects from publication, and at much cost, in order to prevent newspaper appropriation. Photographic publishers frequently have the experience of publishing a subject with good returns to themselves and then have sustained newspaper or magazine infringement which has either cut off the sale altogether or greatly reduced it. Again, it is very clear that photographic subjects taken for the express purpose of giving pictorial news, either through the newspapers or magazines or weekly periodicals, are taken for the express purpose of selling such material and for the compensation to be derived in such selling to newspapers and other periodicals. If this property may be appropriated without compensation, those engaged in that work will be obliged to give it up altogether.

We call attention to the fact that the existing law provides a penalty of \$1 per copy for such infringements. In the case of a photograph not a copy of a work of art it limits the maximum to \$5,000, while in the case of a work of art the maximum is limited to \$10,000. Section 23 of the proposed bill makes the maximum in either case \$5,000, which cuts down the maximum one-half in the case of copies of works of art and leaves it unaltered in the case of photographs not copies of works of the fine arts. There is no increase in the maximum damages in the proposed bill. The section has been drawn to effectively secure the recourse provided by law, but does not increase the penalty.

The third point alleged is that newspaper reprints of photographs are not such reproductions as can be substituted in sales for the originals, and that such reproductions tend to increase sales of the original photographs. Many art dealers will testify, if called upon, that they frequently have newspaper and magazine reprints brought in for framing, which certainly take the place of possible sales of the actual photograph. Not only that, but photographic and picture publishers again and again have experienced the blighting effect

of newspaper reproduction upon subjects which prior to such newspaper publication have been profitable ventures for them. Many explicit examples could be given. We will content ourselves with a case which is very typical.

This year certain newspapers reproduced some drawings of the illustrator Charles Dana Gibson. Following such reproduction there was an immediate falling off of a very considerable extent of certain reproductions of his subjects in other forms, which were intended to be sold directly to the public through dealers. Some subjects have a value due in part to their exclusiveness. It is easily seen that a newspaper reproduction would entirely destroy the value which is due to exclusiveness. Photographic publishers often sell material to book publishers and to high-class magazines in which one of the conditions of sale is that such book or magazine is to have the first and exclusive use of the subject. The acceptance of the subject and the payment of the price therefor is dependent upon such exclusive use. Any proposal which involves allowing newspapers to use such material as they please would, of course, make such arrangements impossible.

It is true that cases can and do arise where a newspaper publication may increase the sales of the original photographs. In all such cases, however, the owner of the original photograph is only too glad to give the newspaper the use of the subject without charge and to turn over to the newspaper a written license protecting it against any penalties for reproduction. In all such cases, therefore, they have nothing to lose by the preservation of the copyright property. There are many other cases, however, where the original owner not only is seriously injured by such infringement, but will also have his subsequent sales of the subject greatly reduced by such newspaper infringement. We respectfully submit again that the publisher of this class of property who finds it necessary to go to the trouble and expense of copy-righting his property so that he may retain control of it only does so because any lack of such control will conclusively be a damage to his property, and that as he is the man who spent the time and money to produce it and as he is the man who has the practical experience in dealing in such property he is likewise the only man who is competent to say whether infringement of the kind proposed is an injury to him or not.

The owner of any other class of property is given the liberty of exclusively enjoying it himself as he pleases. It is just as absurd to base an argument for legalizing infringement upon the alleged ground that no damage is done by the infringement as it would be for the man who makes use of another man's overcoat to base his defense upon the alleged statement that his use of the overcoat did not harm it. We are not interested so much in the matter of penalties as we are in securing an effective deterrent against infringement. The present penalties in the law (which are no greater in maximum amount in the proposed law) are not a deterrent against infringement, because the method of enforcing the penalty is not effective. We are asking for merely the same punishment with an enforcement which will be effective and likewise deterrent.

We assume the newspaper protest is confined to their letter of December 6, but if additional matter is to be filed by them we beg the privilege of making reply.

Respectfully submitted.

THE PRINT PUBLISHERS' ASSOCIATION.  
W. A. LIVINGSTONE, *President*.

#### STATEMENT OF MR. H. N. LOW.

Mr. Low. We have many classes of works protected as reproductions of works of art.

The CHAIRMAN. Do you think the provision that has been referred to would give the right to reproduce music?

Mr. Low. Unless "works of art" refers to reproductions of music by mechanical means, to what other class does that refer?

The CHAIRMAN. That can be covered by saying "not including reproductions of music by mechanical means."

Mr. Low. Very good. May I suggest an addition to clause (b) of section 1?

The CHAIRMAN. Why not do that when we take up the subject of musical reproductions? We are not discussing that to-day.

Mr. Low. This relates to subjects discussed to-day.

The CHAIRMAN. If you have an amendment to offer, you may offer it without comment.

Mr. Low. I suggest that the following be added to clause (b) of section 1, on the first page of the bill:

*Provided*, That such sale and exclusive right shall not continue to exist in any copy after it shall have been sold or assigned by the owner of the copyright therefor; and

*Provided*, That all similar copies of any work copyrighted under this act shall be sold by the publishers of such copies at equal prices to all persons without discrimination, and that said publishers shall not place any restriction on the prices at which the purchaser of said copies shall sell or dispose of the same.

Mr. CURRIER. I suppose you would be satisfied if subsection (b) were stricken out altogether?

Mr. Low. It seems to me the act would be incomplete.

#### STATEMENT OF REV. EDWARD EVERETT HALE.

The LIBRARIAN. Is it the pleasure of the committee to hear Doctor Hale next?

Doctor HALE. I hope it is not a matter of sentiment—I do not think it is—to say that the whole business of copyright law came in in Queen Anne's time by statute, when they supposed they were giving a benefit to authors; but the habit, which I have observed this afternoon, of speaking of authors as if they had nothing to do with the business is modern. Very high legal authority has pronounced that we have a common-law right whether there be any statute or not. It is undoubtedly true that in the century of Milton they thought they had a common-law right, and one gentleman here has seen the original contract by which Milton sold "Paradise Lost" for 20 pounds sterling. He thought he had something to sell, and in Queen Anne's time that common-law right was sufficient for everybody. Then Parliament in its kindness thought it would give a method of registration, so that the State should protect this common-law right.

What is proposed by this bill is to extend that period of the original common-law right. I suppose we live longer now than people did then. I suppose young men did not rush into literature quite so soon then as now. I know that my first copyright expired eleven years ago. Perhaps I have lived too long. A dentist once said to me, "I have now given you all the work you will ever require while on earth." I went about my business and outlived that dentist, and have had to go to another dentist.

This proposed bill provides that a man may leave to his widow his rights whether those rights be placed on paper or not. Suppose I take up a section of 160 acres of land in the West; suppose I find coal on my land and sell the coal; it would be thought hard by me if at the end of twenty-eight years the Government should say "We will take that coal now; you have had it for twenty-eight years, and we will take the rest." We thought the old statute worked much

hardship on us until Congress gave us fourteen years more; but then Congress said, "We will let Tom, Dick, and Harry take this for their privilege."

We ask that that privilege may be extended. It seems to me not an unreasonable request that the term should be extended as proposed in this bill. I suppose that what the people want, what public opinion desires—and that is what we want—is that a class of men may grow up who are willing to devote their lives to research and to literature. You do not want a man to make an invention of a new and useful article or art and never tell it. You want to encourage literature. You are glad to have had such men as Irving and Bancroft and Longfellow. You propose to encourage the existence of that class of men. That is what you do by your copyright law to a certain extent.

Then there arises another class of men who are called "pirates," who say, "Go to the dogs! We will make what we can out of your genius and your efforts."

The statute originally gave the author what was undoubtedly thought sufficient protection for twenty-eight years, and if he lived longer than that he might have fourteen years more. But if he did not live longer than that his widow could not have the advantage of this continuous privilege. Now, I know, and probably many of you gentlemen know, plenty of instances where books grow more and more valuable every year. Take Bryant, for instance; his translation of the *Odyssey* brought better returns last year than the year it was printed. Had he or not a right to leave that increasing property right and value to his survivors, to his widow or his administrators? That is the question really before you. Do you want to protect and help authors, or do you not? Do you want to help and protect pirates who wish to take the fruits of the labors of others for their own?

I was at a meeting recently to consider some memorial to Langley. Langley made inventions, some of which were of first value, for the future. He died. Suppose his conceptions of those inventions were only committed to paper; is it quite fair to say that because they were only on paper before he died those inventions should thereafter be thrown open to the public? I do not think so. I think his widow should have had the same right in that property as in any other property.

But I am here specially to answer any questions.

Mr. CAMPBELL. Is the bill as now drawn satisfactory to you?

Mr. HALE. I think I could have drawn a better bill, but it is satisfactory to me.

I said a moment ago that the value of some books increases as time elapses. That is true of my own books. More copies of my books have been sold in the last year than ever before.

The LIBRARIAN. I desire to make an announcement heretofore requested. Mr. Porterfield desires to make some general statement and perhaps some miscellaneous criticism of the bill presented by Mr. Steuart, chairman of the committee of the American Bar Association, present at the conferences in June. Mr. Walker also desires, I understand, to present later some statements of the music provisions, and it will be possible to take those up on detail hereafter.



## STATEMENT OF MR. SAMUEL L. CLEMENS.

Mr. CLEMENS. I have read the bill. At least I have read such portions of it as I could understand; and indeed I think no one but a practiced legislator can read the bill and thoroughly understand it, and I am not a practiced legislator. I have had no practice at all in unraveling confused propositions or bills. Not that this is more confused than any other bill. I suppose they are all confused. It is natural that they should be, in a legal paper of that kind, as I understand it. Nobody can understand a legal paper, merely on account of the language that is in it. It is on account of the language that is in it that no one can understand it except an expert.

Necessarily I am interested particularly and especially in the part of the bill which concerns my trade; I like that bill, and I like that extension from the present limit of copyright life of forty-two years to the author's life and fifty years after. I think that will satisfy any reasonable author, because it will take care of his children. Let the grandchildren take care of themselves. "Sufficient unto the day." That would satisfy me very well. That would take care of my daughters, and after that I am not particular. I shall then long have been out of this struggle and independent of it. Indeed, I like the whole bill. It is not objectionable to me. Like all the trades and occupations of the United States, ours is represented and protected in that bill. I like it. I want them to be represented and protected and encouraged. They are all worthy, all important, and if we can take them under our wing by copyright, I would like to see it done. I should like to have you encourage oyster culture and anything else. I have no illiberal feeling toward the bill. I like it. I think it is just. I think it is righteous, and I hope it will pass without reduction or amendment of any kind.

I understand, I am aware, that copyright must have a term, must have a limit, because that is required by the Constitution of the United States, which sets aside the earlier constitution, which we call the Decalogue. The Decalogue says that you shall not take away from any man his property. I do not like to use the harsher term, "Thou shalt not steal." But the laws of England and America do take away property from the owner. They select out the people who create the literature of the land. Always talk handsomely about the literature of the land. Always say what a fine, a great monumental thing a great literature is. In the midst of their enthusiasm they turn around and do what they can to crush it, discourage it, and put it out of existence. I know that we must have that limit. But forty-two years is too much of a limit. I do not know why there should be a limit at all. I am quite unable to guess why there should be a limit to the possession of the product of a man's labor. There is no limit to real estate. As Doctor Hale has just suggested, you might just as well, after you had discovered a coal mine and worked it twenty-eight years, have the Government step in and take it away—under what pretext?

The excuse for a limited copyright in the United States is that an author who has produced a book and has had the benefit of it for that term has had the profit of it long enough, and therefore the Government takes the property, which does not belong to it, and

generously gives it to the eighty-eight millions. That is the idea. If it did that, that would be one thing. But it does not do anything of the kind. It merely takes the author's property, merely takes from his children the bread and profit of that book, and gives the publisher double profit. The publisher and some of his confederates who are in the conspiracy rear families in affluence, and they continue the enjoyment of these ill-gotten gains generation after generation. They live forever, the publishers do.

As I say, this limit is quite satisfactory to me—for the author's life, and fifty years after. In a few weeks, or months, or years I shall be out of it. I hope to get a monument. I hope I shall not be entirely forgotten. I shall subscribe to the monument myself. But I shall not be caring what happens if there is fifty years' life of my copyright. My copyrights produce to me annually a good deal more money than I have any use for. But those children of mine have use for that. I can take care of myself as long as I live. I know half a dozen trades, and I can invent a half a dozen more. I can get along. But I like the fifty years' extension, because that benefits my two daughters, who are not as competent to earn a living as I am, because I have carefully raised them as young ladies, who don't know anything and can't do anything. So I hope Congress will extend to them that charity which they have failed to get from me.

Why, if a man who is mad—not mad, but merely strenuous—about race suicide should come to me and try to get me to use my large political or ecclesiastical influence for the passage of a bill by this Congress limiting families to 22 children by one mother, I should try to calm him down. I should reason with him. I should say to him, "That is the very parallel to the copyright limitation by statute. Leave it alone. Leave it alone and it will take care of itself." There is only one couple in the United States that can reach that limit. Now, if they reach that limit let them go on. Make the limit a thousand years. Let them have all the liberty they want. You are not going to hurt anybody in that way. Don't cripple that family and restrict it to 22 children. In doing so you are merely offering this opportunity for activity to one family per year in a nation of eighty millions. It is not worth the while at all.

The very same with copyright. One author per year produces a book which can outlive the forty-two year limit, and that is all. This nation can not produce two authors per year who can create a book that will outlast forty-two years. The thing is demonstrably impossible. It can not be done. To limit copyright is to take the bread out of the mouths of the children of that one author per year, decade, century in and century out. That is all you get out of limiting copyright.

I made an estimate once when I was to be called before the copyright committee of the House of Lords, as to the output of books, and by my estimate we had issued and published in this country since the Declaration of Independence 220,000 books. What was the use of protecting those books by copyright? They are all gone. They had all perished before they were 10 years old. There is only about one book in a thousand that can outlive forty-two years of copyright. Therefore why put a limit at all? You might just as well limit a family to 22. It will take care of itself. If you try to recall to your

minds the number of men in the nineteenth century who wrote books in America which books lived forty-two years you will begin with Fennimore Cooper, follow that with Washington Irving, Harriet Beecher Stowe, and Edgar A. Poe, and you will not go far until you begin to find that the list is limited. You come to Whittier and Holmes and Emerson, and you find Howells and Thomas Bailey Aldrich, and then the list gets pretty thin and you question if you can find 20 persons in the United States in a whole century who have produced books that could outlive or did outlive the forty-two year limit. You can take all the authors in the United States whose books have outlived the forty-two year limit and you can seat them on one bench there. Allow three children to each of them, and you certainly can put the result down at 100 persons. Add two or three more benches. You have plenty of room left. That is the limit of the insignificant number whose bread and butter are to be taken away. For what purpose? For what profit to anybody?

Nobody can tell what that profit is. It is only those books that will outlast the forty-two-year limit that have any value after ten or fifteen years. The rest are all dead. Then you turn those few books into the hands of the pirate—into the hands of the legitimate publisher—and they go on, and they get the profit that properly should have gone to wife and children. I do not think that is quite right. I told you what the idea was in this country for a limited copyright.

The English idea of copyright, as I found, was different, when I was before the committee of the House of Lords, composed of seven members I should say. The spokesman was a very able man, Lord Thring, a man of great reputation, but he didn't know anything about copyright and publishing. Naturally he didn't, because he hadn't been brought up to this trade. It is only people who have had intimate personal experience with the triumphs and griefs of an occupation who know how to treat it and get what is justly due.

Now that gentleman had no purpose or desire in the world to rob anybody or anything, but this was the proposition—fifty years' extension—and he asked me what I thought the limit of copyright ought to be.

"Well," I said, "perpetuity." I thought it ought to last forever.

Well, he didn't like that idea very much. I could see some resentment in his manner, and he went on to say that the idea of a perpetual copyright was illogical, and so forth, and so on. And here was his reason—for the reason that it has long ago been decided that ideas are not property, that there can be no such thing as property in ideas.

I said there was property in ideas before Queen Anne's time, that it was recognized that books had perpetual copyright then. Doctor Hale has explained why they reduced it to forty-two years in Queen Anne's time. That is a very charitable explanation of that event. I never heard it before. I thought a lot of publishers had got together and got it reduced. But I accept Doctor Hale's more charitable view, for his information is more than mine and he is older than I am, but not much older. He is older, but not much older.

That there could be no such thing as property in an intangible idea. He said, "What is a book? A book is just built from base to roof with ideas, and there can be no property in them."

I said I wished he could mention any kind of property existing on this planet, property that had a pecuniary value, which was not derived from an idea or ideas.

"Well," he said, "landed estate—real estate."

"Why," I said, "Take an assumed case, of a dozen Englishmen traveling through the South—Africa—they camp out; eleven of them see nothing at all; they are mentally blind. But there is one in the party who knows what that harbor means, what this lay of the land means; to him it means that some day—you can not tell when—a railway will come through here, and there on that harbor a great city will spring up. That is his idea. And he has another idea, which is to get a trade, and so, perhaps, he sacrifices his last bottle of Scotch whisky and gives a horse blanket to the principal chief of that region and buys a piece of land the size of Pennsylvania. There is the value of an idea applied to real estate. That day will come, as it was to come when the Cape-to-Cairo Railway should pierce Africa and cities should be built, though there was some smart person who bought the land from the chief and received his everlasting gratitude, just as was the case with William Penn, who bought for \$40 worth of stuff the area of Pennsylvania. He did a righteous thing. We have to be enthusiastic over it, because that was a thing that never happened before probably. There was the application of an idea to real estate. Every improvement that is put upon real estate is the result of an idea in somebody's head. A skyscraper is another idea. The railway was another idea. The telephone and all those things are merely symbols which represent ideas. The washtub was the result of an idea. The thing hadn't existed before. There is no property on this earth that does not derive pecuniary value from ideas and association of ideas applied and applied and applied again and again and again, as in the case of the steam engine. You have several hundred people contributing their ideas to the improvement and the final perfection of that great thing, whatever it is—telephone, telegraph, and all."

So if I could have convinced that gentleman that a book which does consist solely of ideas, from the base to the summit, then that would have been the best argument in the world that it is property, like any other property, and should not be put under the ban of any restriction, but that it should be the property of that man and his heirs forever and ever, just as a butcher shop would be, or—I don't care—anything, I don't care what it is. It all has the same basis. The law should recognize the right of perpetuity in this and every other kind of property. But for this property I do not ask that at all. Fifty years from now I shall not be here. I am sorry, but I shall not be here. Still, I should like to see it.

Of course we have to move by slow stages. When a great event happens in this world, like that of 1714, under Queen Anne, it stops everything, but still, all the world imagines there was an element of justice in that act. They do not know why they imagine it, but it is because somebody else has said so. And that process must continue until our day, and keep constantly progressing on and on. First twenty-eight years was added, and then a renewal for fourteen years; and then you encountered Lord Macaulay, who made a speech on copyright when it was going to achieve a life of sixty years,

which reduced it to forty years—a speech that was read all over the world by everybody who does not know that Lord Macaulay did not know what he was talking about. So he inflicted this disaster upon his successors in the authorship of books. It has to undergo regular and slow development—evolution.

Here is this bill, one instance of it. Make the limit the author's life and fifty years after, and, as I say, fifty years from now they will see that that has not convulsed the world at all. It has not destroyed any San Francisco. No earthquakes concealed in it anywhere. It has changed nobody. It has merely fed some starving author's children. Mrs. Stowe's two daughters were close neighbors of mine, and—well, they had their living very much limited.

That is, to my mind, about what I was to talk about. I have some notes—I don't know in which pocket I put them—and probably I can't read them when I find them.

There was another thing that came up in that committee meeting. I would rather get the advantage of a lord than most anyone. He asked me on what ground I could bring forth such a sort of monstrosity as that—the idea of a perpetual copyright on literature.

He said, "England does not do that." That was good argument. If England doesn't do a thing, that is all right. Why should anybody else? England doesn't do it. England stands for limited copyright, and will stand for limited copyright, and not give unlimited copyright to anybody's books.

I said, "You are excepting one book."

He said, "No; there is no book in England that has perpetual copyright."

I said, "Yes; there is one book in England that has perpetual copyright, and that is the Bible."

He said, "There is no such copyright on the Bible in England."

But I had the documents with me, and I was able to convince him that not only does England confer perpetual copyright upon the Old and New Testaments, but also on the Revised Scriptures, and also on four or five other theological books, and confers those perpetual copyrights and the profits that may accrue not upon some poor author and his children, but upon the rich and competent, who can take care of themselves without perpetual copyright. There was that one instance of injustice, the discrimination between the author of the present day and the author of thousands of years ago, whose copyright had really expired by the statute of limitations.

I say again, as I said in the beginning, I have no enmities, no animosities toward this bill. This bill is plenty righteous enough for me. I like to see all these industries and arts propagated and encouraged by this bill. This bill will do that, and I do hope that it will pass and have no deleterious effect. I do seem to have an extraordinary interest in a whole lot of arts and things. The bill is full of those that I have nothing to do with. But that is in line with my generous, liberal nature. I can't help it. I feel toward those same people the same sort of charity of the man who arrived at home at 2 o'clock in the morning from the club. He was feeling perfect satisfaction with life—was happy, was comfortable. There was his house weaving and weaving and weaving around. So he watched his chance, and by and by when the steps got in his

neighborhood he made a jump and he climbed up on the portico. The house went on weaving. He watched his door, and when it came around his way he climbed through it. He got to the stairs, went up on all fours. The house was so unsteady he could hardly make his way, but at last he got up and put his foot down on the top step, but his toe hitched on that step, and of course he crumpled all down and rolled all the way down the stairs and fetched up at the bottom with his arm around the newel post, and he said, "God pity a poor sailor out at sea on a night like this."

The committee adjourned until 10 o'clock a. m. to-morrow.

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SATURDAY, December 8, 1906—10 o'clock a. m.

The committee met at the Senate reading room, Congressional Library, jointly with the House Committee on Patents.

Present: Senators Kittredge (chairman), Clapp, Smoot, Mallory, and Latimer; Representatives Currier, Hinshaw, Bonyng, Campbell, Barchfeld, Chaney, McGavin, Legare, and Webb.

The CHAIRMAN. The committee would like to hear from Mr. Montgomery first.

The LIBRARIAN. Mr. Montgomery, Mr. Chairman, would like to note, for the information of the committee, some difficulties that might be experienced by the Treasury Department in actually applying the provisions of section 30—is that it, Mr. Montgomery?—as to importations.

Mr. MONTGOMERY. Section 30 and section 16. I did intend to say something about the cataloguing of the title entries, the inability of customs officers to detect these illegal importations; but if I am to confine my statement to section 30, I will do so.

The LIBRARIAN. Mr. Montgomery, are you the official in the Treasury Department who has particularly to do with importations?

Mr. MONTGOMERY. Yes, sir.

The LIBRARIAN. From this end—that is, in the main Department?

Mr. MONTGOMERY. Yes, sir; I expect I had better make a little broader statement.

The CHAIRMAN. How much time do you wish, Mr. Montgomery?

Mr. MONTGOMERY. Five minutes, I should say, will be enough.

**STATEMENT OF C. P. MONTGOMERY, ESQ., LAW CLERK, CUSTOMS  
DIVISION, TREASURY DEPARTMENT.**

Mr. MONTGOMERY. The Treasury Department is required by existing law to render protection to the copyright proprietor by preventing importations which infringe his rights, and it is also required to protect certain of our industries—typesetting, for instance—against importations of books, etc., copyrighted in the United States, but manufactured abroad. To aid the Treasury and Post-Office Departments in executing the law, the act of 1891 provides for the publication and distribution weekly of catalogues of title entries. These title entries, which show the various titles of copyrighted books and other articles, now number over a million and a half. In order that

a customs officer may know whether a book, for instance, is copyrighted, he must examine these title entries, unless the book bears notice of United States copyright. In the latter event he at once becomes aware that the book is prohibited importation, because it bears a false notice of copyright or because it is manufactured abroad in violation of the manufacturing clause. Such a book is detained or seized, and the proper parties are notified. But when the book does not bear notice of United States copyright it devolves upon the customs officer to examine the title entries. This is wholly impracticable, as is shown by the following correspondence with the United States appraiser at the port of New York:

TREASURY DEPARTMENT, OFFICE OF THE SECRETARY,  
*Washington, October 4, 1905.*

The UNITED STATES APPRAISER,  
*641 Washington street, New York, N. Y.*

SIR: Referring to former correspondence in relation to the weekly catalogues of title entries of copyrighted articles, I will thank you to inform me whether, in your opinion, the protection provided by the copyright laws could be more effectually accomplished if general indexes are prepared at more frequent intervals, and if, when there is doubt as to the legality of any importation, printed notices were prepared and sent to consignees of articles subject to copyright requesting the consignees to state whether the articles are in fact copyrighted in the United States, and whether the written consent to the reproduction, importation, etc., as provided by the statutes, has been obtained.

I will thank you for an early reply.

Respectfully,

H. A. TAYLOR, *Acting Secretary.*

UNITED STATES CUSTOMS SERVICE,  
OFFICE OF THE APPRAISER,  
*Port of New York, October 5, 1905.*

The SECRETARY OF THE TREASURY.

SIR: I have the honor to acknowledge receipt of Department letter of October 4 in relation to the better enforcement of the copyright laws.

In reply I have to report that in my opinion the more frequent publication of the general indexes and the preparation of the printed notices to consignees, as suggested, would not be of material assistance to this department in more effectually accomplishing the protection provided by the copyright laws. There are so many books imported daily that it is a physical impossibility to look up each title and ascertain whether or not it is copyrighted; to illustrate, we have for examination to-day, and to-day is no exception to the general routine, books of over 1,000 different titles; to look up in the indexes all of those 1,000 titles would take one man ten days, and unless all the titles are looked up it can not be known whether or not those books are imported in violation of the copyright laws.

Respectfully,

G. W. WHITEHEAD,  
*Appraiser.*

It seems then that the proprietor of the copyright as well as the typesetter may not get the protection the statutes warrant.

Again, the existing statutes do not provide a satisfactory mode of procedure for the forfeiture of prohibited copyright importations. The framers of the customs revenue statutes relative to forfeiture never contemplated their application to violations of the copyright laws, and there has been considerable doubt whether they may be applied. But suppose they may be invoked and the offending article is forfeited; then the forfeited article should be sold under the customs revenue statutes, and that defeats the very object of the law. Thus it may be seen that the Treasury Department has labored under some difficulties in this connection. True, the statutes provide that

the Secretary of the Treasury and the Postmaster-General shall make regulations to carry out the provisions of the act prohibiting importations; but it has not been deemed proper to make regulations to forfeit and destroy prohibited copyright importations without due process of law in the common acceptance of that term, except in the case of music imported through the mails. These latter importations are of small value, and there has been but slight protest against this summary action. The result has been largely, except in the case of music, that the offending articles are permitted exportation.

Coming to the bill under consideration, I wish to say that sections 26 to 29, inclusive, and section 31 were framed with a view to filling the necessary requirements as to procedure against authorized and unauthorized importations, and it is believed that if enacted into law there will be no further difficulty on this score.

There still remains, however, the inability of the customs officers to examine catalogues of title entries to determine whether a given importation is prohibited. To make more effective the protection granted it would seem necessary that the copyright proprietor or the injured party should be required to notify the Treasury Department of any importation, actual or contemplated, in violation of his rights. If this were done the Department would duly notify customs officers, and they could keep special watch for the article or articles. This notice is made all the more necessary by the provisions of section 16 and subsections E first and third of section 30, which place greater limitations on importations. And in this connection I would like to state that while the Treasury Department has not the slightest desire to place any obstacle in the way of the copyright proprietor obtaining the fullest protection, yet it is believed that the provision in subsection E first, requiring permission of the proprietor of the copyright before a book may pass the customs, and subsection E third, limiting the privilege of importation without the consent of the copyright proprietor to cases in which the American edition is exhausted or can not be supplied by the American copyright proprietor or publisher, will result in delays and complaints.

Again, if such books are imported through the mails there will most likely be delays of the mails.

Such requirements are burdensome upon the Treasury Department, and if they are to be enacted into law then the machinery for making them effective should be supplied.

Your attention is invited to the criticism of the bill on page 109 of the pamphlet "Amendments proposed," issued by the Copyright Office.

It may also be well to state that the Treasury Department has communicated through the State Department with the British and Canadian governments concerning the law and practice in cases arising under provisions similar to subsections E one and three. No reply has been received from the British Government, but the Canadian government has made reply. I will read the correspondence:

TREASURY DEPARTMENT, OFFICE OF THE SECRETARY,  
Washington, December 1, 1906.

MR. THORVALD SOLBERG,  
*Register of Copyrights, Library of Congress.*

SIR: Referring to the draft of a proposed bill to amend and consolidate the acts respecting copyright, section 30, subsections 1 and 3, which authorize the importation of books copyrighted in the United States under permission given by



the proprietor of the American copyright, etc., I have to inform you that on the 13th ultimo this Department addressed a letter to the commissioner of customs at Ottawa, Canada, in which the following questions were asked:

"What is the law and the practice in Canada applicable to the following cases:

"1. A is the copyright proprietor of a book published in Canada. B fraudulently reprints the book in the United States and one or more copies are imported into Canada, through the mails and otherwise, for personal use, for libraries, etc., and for sale or hire.

"2. A, the proprietor of a Canadian copyright book, authorizes B to reprint the book in the United States, and one or more copies of the authorized reprints are imported into Canada, through the mails and otherwise, for personal use, for libraries, etc., and for sale or hire.

"3. B, the proprietor of an American copyright book, authorizes A to reprint the book in Canada, and copies of the authorized American edition are imported into Canada, through the mails and otherwise, for personal use, for libraries, etc., and for sale or hire."

To this communication the commissioner of customs replied, under date of the 21st ultimo, and I inclose herewith a copy of said letter. It will be observed therefrom that books copyrighted in Canada and fraudulently reprinted in the United States are prohibited importation into Canada, except when imported by or with the consent of the Canadian copyright proprietor; that authorized reprints in the United States are permitted importation into Canada when imported by or with the consent of the Canadian copyright owner; and that in the case of a book printed in Canada under the authority of the proprietor of the American copyright in such book, the American copyright book is not considered a reprint of any work copyrighted in Canada, and would not, therefore, be prohibited from importation.

Respectfully,

J. H. EDWARDS, *Acting Secretary.*

DEPARTMENT OF CUSTOMS,  
*Ottawa, November 21, 1906.*

The ASSISTANT SECRETARY,  
*Treasury Department, Washington, D. C.*

SIR: I have the honor to acknowledge the receipt of your letter of the 13th instant, asking for the following information concerning copyrighted books imported into Canada, viz:

"1. What is the law and the practice in Canada applicable to the following cases:

"1. A is the copyright proprietor of a book published in Canada. B fraudulently reprints the book in the United States, and one or more copies are imported into Canada, through the mails and otherwise, for personal use, for libraries, etc., and for sale or hire.

"2. A, the proprietor of a Canadian copyright book, authorizes B to reprint the book in the United States, and one or more copies of the authorized reprints are imported into Canada, through the mails and otherwise, for personal use, for libraries, etc., and for sale or hire.

"3. B, the proprietor of an American copyright book, authorizes A to reprint the book in Canada, and copies of the authorized American edition are imported into Canada, through the mails and otherwise, for personal use, for libraries, etc., and for sale or hire."

In reply I inclose two copies of circular of the department of agriculture, containing the copyright act. I am unable to advise you, however, in regard to the copyright act generally.

The importation of the following books is prohibited under the customs tariff, 1897, viz:

"637. Reprints of Canadian copyright works, and reprints of British copyright works which have been copyrighted in Canada also."

The practice of this department in respect of copyright works prohibited from importation under the customs tariff is as follows:

1. In the case of a book copyrighted in Canada, a fraudulent reprint thereof published in the United States is held to be prohibited from importation into

Canada, for any purpose, except when imported by or with the consent of the Canadian copyright proprietor and so certified.

2. In the case of a book copyrighted in Canada, a reprint thereof published in the United States by authority of the Canadian copyright owner, would be permitted importation into Canada, only when imported by or with the consent of the Canadian copyright owner and so certified.

3. In the case of a book printed in Canada under the authority of the proprietor of the American copyright in such book, it would appear in such case that the American copyright book is not a reprint of any work copyrighted in Canada, and would not therefore be prohibited from importation into Canada, under the customs tariff.

I have the honor to be, sir, your obedient servant,

JOHN McDUGALD,  
*Commissioner of Customs.*

The CHAIRMAN. Mr. Montgomery, have you drafted any amendments that you would like to suggest to this bill?

Mr. MONTGOMERY. With regard to the notice to be sent to the Treasury?

The CHAIRMAN. The different sections that you mention.

Mr. MONTGOMERY. Sections 26 to 29, inclusive, were put in the bill at the suggestion of the Treasury Department. I have not drawn any amendment with regard to notice. I think that could be done very easily.

The CHAIRMAN. Will you do that within a week?

Mr. MONTGOMERY. I can do it this morning.

The CHAIRMAN. And send a copy to Mr. Currier and one to the librarian and one to my secretary or clerk?

Mr. MONTGOMERY. I will be glad to do so; yes, sir.

Mr. CURRIER. Would you suggest, then, that in all authorized editions notice of copyright should be given?

Mr. MONTGOMERY. That in all authorized editions printed abroad the American notice of copyright should be placed?

Mr. CURRIER. Yes.

Mr. MONTGOMERY. Well, Mr. Currier, our customs officers would stop a book of that sort to-day. That is really the only benefit the copyright proprietors are getting under this catalogue title entry—I mean, under the provisions of the act prohibiting importations unless there is the United States notice of copyright, printed in the book, our officers have not time to look over a million and a half title entries, and they pass the book.

Mr. CURRIER. That is the question—whether it was not for their protection that the notice of the American copyright should be given.

Mr. MONTGOMERY. Then we would stop it; unquestionably. Our officers would stop it. It would be a good idea, I think.

Senator MALLORY. Mr. Montgomery, have you any suggestion to make as to how the delay to which you referred, arising out of the necessity of showing that the copyright proprietor has given his consent to the importation, could be obviated?

Mr. MONTGOMERY. Why, a great many of these books are imported by book post. Now, if the customs officer did his duty (and he would if he knew the book was copyrighted), he would hold that book up. That means holding up the mails until the permission of the copyright proprietor is granted. The copyright proprietor might live in San Francisco.

Senator MALLORY. I can readily see where the delay would arise.

Mr. MONTGOMERY. Yes, sir.

Senator MALLORY. But how do you obviate it?

Mr. MONTGOMERY. If the owner of the copyright, as I state here, will notify the Treasury Department of any importation, actual or contemplated—if he suspects that some person is importing books in violation of his rights, and will notify the Treasury Department we will send out copies to each of the collectors, and they will take special care to watch out for that book or whatever the article may be, and will almost surely detect it.

Senator MALLORY. That will prevent the importation of a book that ought not to be brought in; but where a book is brought in with the consent of the copyright proprietor, but the customs officers do not know whether they have his consent or not, they will have to inquire. Why not throw the burden on the injured party to notify the Treasury Department?

Mr. MONTGOMERY. That is what I have suggested here, sir. I have suggested that—that the injured party notify the Treasury Department of his injury. And if he does we will take steps to prevent it. We can do it. But we can not do it by searching a million and a half title entries.

Mr. CHANEY. Then, in all respects the bill suits your ideas save on the question of the notice?

Mr. MONTGOMERY. Yes, sir; I should say so. We can work under the bill if we get a notice or something of that sort to keep the customs officers from searching these title entries.

Mr. CHANEY. Anything that would resolve itself into shape to require notice to be given to you would be all right?

Mr. MONTGOMERY. Yes, sir; to the Treasury.

Mr. CHANEY. That is what I mean to say.

Mr. MONTGOMERY. The copyright proprietor is the injured person. You are giving him this benefit, and he ought to be required to help the Treasury Department help him.

**STATEMENT OF CHARLES PORTERFIELD, ESQ., OF NORTHPORT,  
LONG ISLAND.**

The LIBRARIAN. Mr. Porterfield, you are connected with the Edward Thompson Company?

Mr. PORTERFIELD. The Edward Thompson Company, of Northport, Long Island, law publishers.

The LIBRARIAN. You are book publishers?

Mr. PORTERFIELD. Law publishers; yes, sir.

The LIBRARIAN. Before you start, Mr. Porterfield, may I ask this: You have made somewhat extensive criticism of the bill in two articles in the "Law Notes," have you not?

Mr. PORTERFIELD. Yes.

The LIBRARIAN. And those criticisms were tabulated, abstracted, in the amendments?

Mr. PORTERFIELD. Yes; in the amendments.

The LIBRARIAN. In this printed statement of the amendments.

We understood from you that that statement was satisfactory to you; it was accurate so far as it went?

Mr. PORTERFIELD. Yes.

The LIBRARIAN. I ask this because if you should find that within the thirty minutes which you have asked for you are not able to cover all the criticisms you have covered here, the committee may depend upon this as an accurate statement?

Mr. PORTERFIELD. I think so; yes; and I can also give my criticisms in full in printed form if the committee desire it.

The LIBRARIAN. Yes.

The CHAIRMAN. Mr. Porterfield, I understand that you desire thirty minutes?

Mr. PORTERFIELD. Yes, Mr. Chairman; I should like to have at least thirty minutes.

The CHAIRMAN. Does Mr. Walker appear with you?

Mr. PORTERFIELD. Mr. McKinney is here, appearing with me. This is Mr. McKinney, now present.

The CHAIRMAN. Does he desire to address the committee?

Mr. McKINNEY. I understood that a small bit of time has been allotted to me, Mr. Chairman.

The CHAIRMAN. How much time?

Mr. McKINNEY. But I only arrived yesterday from abroad, and I have not had a chance to learn the state—

The LIBRARIAN. We had already heard, Mr. Chairman, that Mr. McKinney would like an opportunity to say something. He is connected with the same company. I do not know whether he would speak from the standpoint of general legal criticism or from the practical standpoint of a particular firm of publishers. In what way, in other words, would you cover ground not covered by Mr. Porterfield? I think the committee might like to know that.

Mr. McKINNEY. My remarks would be general, as to the general aspect of the bill, and not directed to any special feature of it.

The CHAIRMAN. We will determine that question after we have heard Mr. Porterfield.

Mr. McKINNEY. It may be, Mr. Chairman, that you will not care to hear me after Mr. Porterfield has addressed you.

The CHAIRMAN. Your time expires at 5 minutes to 11, Mr. Porterfield.

Mr. PORTERFIELD. Mr. Chairman and gentlemen, in appearing before you this morning I represent very largely myself as a legal author, as a writer of law treatises; and I also represent to a very large extent the public in the desire to have a copyright law that will be permanent and clear and certain all the way through. I also speak as one who has had quite extensive experience in copyright litigation. I have studied this bill carefully, and I have studied the present copyright law, and it is my opinion that this bill is not satisfactory in a great many respects. It is very incomplete; it is inapt in expression, and many of its provisions are conflicting and contradictory. It seems to have been framed by the formulation of various provisions designed for the benefit of some particular interest; and all of these have been assembled together and constitute the present bill.

A very serious objection to the bill as it now stands is its novelty. It is all new in its terms. It does not include any of the existing law. The consequence of that, of course, would be that every question which would arise hereafter in copyright law would be one of first impression and embarrassment, of course, and would make it impossible for counsel to advise with any degree of certainty.

A further confusing circumstance is in the repealing clause, section 64 [examining bill].

The CHAIRMAN. We are familiar with the terms of it.

Mr. PORTERFIELD. Yes. In other words, that section 64 leaves the present law in force throughout, except so far as it is inconsistent with the provisions of this bill.

Mr. CURRIER. I do not think you need take much time with that. I do not think the committee will enact that kind of a repealing clause.

Mr. PORTERFIELD. Very well, sir; I will pass that by, then.

As to the need for so radical a measure as this, putting it all in new terms, it really is inconceivable that the present law has entirely failed of its purpose. It has been in effect without substantial change for more than a hundred years. During that time, of course, a very large number of copyrights have been obtained, and there never has been a time when authors derived the large profits from their writings that they do at this time. And it does not really seem that there is any need for any great extension of the protection they receive. It may be, and probably is, that there are some things that might be added to the copyright protection; but I doubt that it will need such extensive changes as that.

I will now take up some of the particular provisions of this bill and begin with section 1. Section 1 seems to be designed both to define copyright and to state what things shall be subject to copyright protection. Clause A of section 1 provides—

That the copyright secured by this act shall include the sole and exclusive right, for the purposes set forth in subsection B hereof, to make any copy of any work or part thereof the subject of copyright under the provisions of this act;

and that in connection with section 23, which provides—

That if any person shall infringe the copyright in any work protected under the copyright laws of the United States by doing or causing to be done, without the consent of the copyright proprietor, \* \* \* any act the exclusive right to do or authorize which is by such laws reserved to such proprietor, such person shall be liable, etc.

In other words, that clause A of section 1 and section 23 seem to be designed to define definitely what an infringement shall consist of. As the law now stands, a copyright gives the right to multiply copies for the benefit of the author or his assigns and heirs, and an infringement is doing or causing to be done anything by which that right is invaded. In other words, the idea is to protect the author against any diversion of the profits which ought to come to him, and anything by which one person will abstract from the author's profits is an infringement of copyright.

The courts, in construing the present copyright law, have defined infringement as reproducing a protected work or any substantial or material part of it, and this clause A of section 1 seems to make a flat definition of infringement as making any copy or any part. The

distinction is between the present law, which says "any material part," and the bill, which says "any part." It must be that this section has that meaning; otherwise it is useless and means nothing.

Now, it is just as impossible to make a definition of infringement of copyright which will fit all cases as it is to define exactly reasonable doubt or negligence or any other of those general matters. Each case depends on its own circumstances, and it should be left to the court to decide in every case whether one work is an infringement of the copyright of another work, and you can not define it exactly.

Mr. CHANEY. I take it, Mr. Porterfield, that the idea now was to eliminate the necessity of determining what a material part is.

Mr. PORTERFIELD. Yes, sir; that is exactly the point I am making.

Mr. CHANEY. Is not that all right, to do that?

Mr. PORTERFIELD. I think not; I think it is impossible to do that, because if that is eliminated, then all that it would be necessary to show to prove an infringement would be that there was some sentence or paragraph of one work found in another. It does not take into consideration the purpose of the use or the extent of it. There are a great many works which one author may very properly, both in law and morals, use in doing his own work, and if you cut off that right you simply suppress a great deal of the literature of the country.

Mr. CURRIER. Mr. Porterfield, could you give the time to formulating amendments to carry out the ideas you suggest?

Mr. PORTERFIELD. Amendments to this bill?

Mr. CURRIER. Yes.

Mr. PORTERFIELD. Mr. Chairman, I do not believe that this bill in its present form can even be made the basis for a copyright bill. That is my idea.

Mr. CURRIER. Then, from your point of view it would be useless?

Mr. PORTERFIELD. Yes. I think this bill has some very excellent provisions in it, but they should be put in better and more certain and permanent form than they are now. The whole thing seems to me to be confused and obscure, and it is really impossible to tell what the law would be under this bill if it were enacted. I will give you an illustration of that now.

There was a great deal said here yesterday about this domestic-manufacture clause—the setting of type in this country and printing in foreign countries from that type or from plates made from that type. That, I understand, is very much insisted on; and there is a representative of that interest here present who made some remarks yesterday. He seems to be perfectly satisfied with this bill. Am I right, Mr. Sullivan? You are satisfied with the provisions of this bill in regard to the domestic manufacture, are you?

Mr. SULLIVAN. I did not hear the question.

Mr. PORTERFIELD. I understand that you said yesterday that you were satisfied with the provisions of this bill in regard to domestic manufacture?

Mr. SULLIVAN. I am with the amendment which we have proposed, generally.

Mr. PORTERFIELD. Yes.

Mr. SULLIVAN. There are some objections which we waived in order to bring the bill up for consideration.

Mr. CURRIER. I suppose they will offer an amendment making it necessary to manufacture here.

Mr. PORTERFIELD. Yes; but the amendments will not affect what I am going to call attention to at all.

The provision in this bill is that copyright shall be obtained by publication of the work with the notice of copyright. It is the publication with the notice of copyright that gives the copyright under this bill; and there is no other condition precedent to obtaining a copyright. There are various subsequent provisions as to things that must be done. For instance, there must be an affidavit made, I believe, that the book was printed from type set in the United States; but there is no serious consequence that follows from not doing that thing. After the publisher or copyright proprietor has obtained his copyright by publishing with the notice of copyright, he has his copyright.

Mr. CURRIER. That can be invalidated, can it not?

Mr. PORTERFIELD. No, sir; under this bill it can not be. He has his copyright then, and the domestic-manufacture clause is all gone.

A GENTLEMAN. The importation is prohibited.

Mr. PORTERFIELD. The importation might be prohibited, but it is not a question of importation. You have your type set in Canada, and your plates made there and brought to this country—that can be done; that could be done under this bill.

The GENTLEMAN. No; it could not.

Mr. PORTERFIELD. Yes, sir. There is nothing in the bill that would vitiate the copyright on that ground. The copyright would be given by publication with the notice of copyright.

Mr. CURRIER. I am not able just now to turn to the particular section, but I had an impression that that section provided that upon proof that it was not so printed the copyright would be invalidated.

Mr. PORTERFIELD. I do not so understand it, sir.

Mr. CURRIER. What section is that?

The LIBRARIAN. Section 13, sir.

The REGISTER OF COPYRIGHTS. The second paragraph.

The LIBRARIAN. Beginning at line 14.

Mr. CURRIER (reading). "And all of his rights and privileges under said copyright shall thereafter be forfeited." That was put in for the purpose of invalidating that copyright.

A GENTLEMAN. If you will permit me, Mr. Chairman, that is the penalty for making a false affidavit. If a man makes no affidavit at all, the bill does not apply to him so as to invalidate the copyright.

Mr. CURRIER. Must he not make this affidavit?

The GENTLEMAN. No; there is no compulsion put upon him by the bill to make the affidavit. All he has to do is to forget it, and then his copyright is perfectly valid.

Mr. PORTERFIELD. All he has to do is to just forget it, right away.

Mr. CURRIER. I think it may be understood generally here that there will be such a provision in any bill that passes. I had an impression that that was already taken care of. This reads, "In the case of the book the copies so deposited shall be accompanied by an affidavit."

Mr. PORTERFIELD. There is not any obligation on him to deposit those copies even. He can forget that.

Mr. CHANEY. Well, if this is the situation of this bill, we had better back out and start in over again.

Mr. PORTERFIELD. I think so.

Mr. LEGARE. The question is, "Where are we at?"

Mr. CHANEY. I supposed that this bill was taken as a whole, and that all the parts of this bill would be fitted to the others.

Mr. CURRIER. I might say that I understand that the provision in reference to depositing those copies is not clear; that that is one of the things that the committee certainly would need to take care of.

Mr. CHANEY. The purpose, of course, was to do that.

Mr. CURRIER. I think it has been the purpose of the committee to take care of that, anyway, all the time. It will be made clear. You do not need to discuss that, I think, Mr. Porterfield.

Mr. PORTERFIELD. All right, sir.

Going back again to this clause a of section 1. So far as purely creative works are concerned, of course, there is no use that one writer can properly make of the work of another; but in all works of science or works that in any way involve any original research he is obliged to go to the previous authorities; he is obliged to use the books of other writers. The writer of a legal treatise, for instance, must get his matter from the reports of the cases. That is the primary source. He must find his authorities, and to that extent he must use the works of others who have gone before him. Without that it would be impossible.

Senator SMOOT. Mr. Porterfield, all that you desire them to add to that would be, on line 6, after the word "or," the word "material?" Would that answer your purpose?

Mr. PORTERFIELD. That would cure that section, yes, sir; that would cure that clause, I mean, of that section, so that the doctrine of fair use should not be cut out. The law is perfectly settled now in regard to that, and there is really no need for any such provision as this.

Senator SMOOT. I would suggest that your time is flying very fast, and I do not think there will be any need of spending any more time on this.

Mr. PORTERFIELD. Then, I will take up this next clause, clause b. I understood the chairman to say yesterday that the committee would not consider at all any such idea as that clause b should prohibit a man from reselling a book after he had bought it. Now, clause b does mean that, and it can not mean anything else. Clause a says, "For the purposes set forth in subsection b hereof, to make any copy," etc.

Mr. CURRIER. You do not need to give a minute's time to this subsection b.

Mr. PORTERFIELD. All right, sir.

The CHAIRMAN. Let me ask you this question: Is there any trouble under existing law in reference to the matters treated in subsection b?

Mr. PORTERFIELD. There is great dissatisfaction.

The CHAIRMAN. Is there any serious difficulty and trouble?

Mr. PORTERFIELD. No, sir; there is no trouble.

The CHAIRMAN. In what respect does existing law differ from subsection b?



Mr. PORTERFIELD. Subsection b is entirely omitted, in that now, when a man buys a copyrighted book, the complete title vests in him and he can deal with it as he wishes.

The CHAIRMAN. Would it under subsection b?

Mr. PORTERFIELD. It would not under subsection b.

Mr. WEBB. Under this section he could not sell that copyrighted book?

Mr. PORTERFIELD. He could not sell it without infringing the copyright.

The CHAIRMAN. The old law says "vend." Now, what is the difference between vending and selling?

Mr. PORTERFIELD. The difference, Mr. Chairman, is this, that it is all taken together, to make and vend—that is, to put it on the market; but when the article is once launched on the market it is an ordinary chattel and passes from hand to hand. Subsection b is designed to stop that very thing. I know that, Mr. Chairman, because the representative of a large publishing house told me that it was very desirable to cut off this secondhand book business.

The CHAIRMAN. You need not spend any time on subsection b. If the committee finds that that is the construction that may properly be placed upon it it would change it so as to correct it.

Mr. PORTERFIELD. I think there is no doubt of it.

The CHAIRMAN. Now you can pass on, if you please.

Mr. JOHNSON. Mr. Chairman, may I interrupt and suggest that the discussion is really on the words following "or"—"offer or keep for sale"—and that the early part of section b is practically the same as the present word "vend?"

Mr. PORTERFIELD. No, sir; it is not.

The CHAIRMAN. It is quite unnecessary to have further discussion about subsection b, for the reason that I stated a moment ago.

Mr. PORTERFIELD. Section 3 is—

that the copyright provided by this act shall extend to and protect all the copyrightable component parts of the work copyrighted, any and all reproductions or copies thereof, in whatever form, style, or size, and all matter reproduced therein in which copyright is already subsisting, but without extending the duration of such copyright.

I claim that that section is wholly obscure. It probably is intended to fit those cases in which copyright matter contained in various publications is brought together into one for some purpose or another, like collections of stories, and the like. But the present law, if it is observed in that respect, in most cases will give that very protection. The question here is not that the reproduction will vitiate the copyright. As long as the law of notice is complied with, the copyright is preserved in whatever form the copyrighted work appears. Section 3 must be read in connection with section 6, which provides that all "compilations, arrangements, or other versions of works, whether copyrighted or in the public domain, shall be regarded as new works subject to copyright under the provisions of this act." Therefore, if a man recompiles some of his copyrighted work, and copyrights that, he gets a new copyright, and as far as I can see he will have a new term of copyright running on this old matter of his. In that way the copyright

could be made perpetual, simply by compiling and recompiling as often as the copyright was about to expire—by compiling it with something new and getting a new copyright—because section 6 says that this revision or new edition or compilation or other version shall be a new work, and there never would be any limit to copyright under it.

The whole question is one of notice. Now, the present law is somewhat deficient in that respect. But a very simple provision added to the present law would make all this perfectly plain and easy, without these long, cumbersome provisions about new works and new copyrights.

Mr. CURRIER. Suppose you formulate that.

Mr. PORTERFIELD. I can formulate that. I would not like to take the time to do it right now, but I can submit it to the committee later on in writing. Will that be satisfactory?

The CHAIRMAN. Within one week.

Mr. PORTERFIELD. Could I have two weeks?

The CHAIRMAN. No; you can have one week.

Mr. PORTERFIELD. Because, Mr. Chairman, I am very much occupied now, and I do not know that I could certainly say that I could do that. If I could have two weeks to do it, I could certainly do it.

The CHAIRMAN (after consultation). We think that you should formulate your amendment, or any amendments to this bill, within one week, so that they can reach the Librarian and the House committee and the Senate committee not later than a week from Monday morning.

Mr. PORTERFIELD. Yes, sir; I will try to do it.

I wish now to call attention to section 7. It is in regard to matters in which there shall be no copyright. Section 1, you will observe, enumerates a good many things in very general terms which shall be the subject of copyright, and section 7 specifies those in which there shall be no copyright. Clause a, that section, specifies "any publication of the United States Government, or any reprint, in whole or in part, thereof," and clause b refers to the works of foreign authors. But it is this clause a that I refer to—"any publication of the United States Government." The present law is that no copyright shall subsist in any publication of the Government nor in judicial opinions. That is the law now. It is perfectly well settled; and this bill, in undertaking to enumerate the things in which there shall be copyright and those things in which there shall not be copyright, seems to imply that everything that is not mentioned in section 7 shall be the subject of copyright, and particularly in view of section 4, which says that the works for which a copyright may be secured under this act shall include "all the works of an author." Surely the opinion of a judge is one of his works, and it might very reasonably be so construed that somebody would get a copyright on the opinions of the courts. Who it would be I do not know; probably the judge, if he took it out; probably the first publisher that got a copy and published it; it is impossible to say. That is also very important in connection with what I said in regard to the effect of clause a of section 1—that it would cut off any sort of use of these books by writers. A man

could not extract anything from the opinion of a court without subjecting himself to liability for a suit for infringing these copyrighted reports.

Senator MALLORY. That could be corrected by putting in the words "judicial opinions," could it not?

Mr. PORTERFIELD. There is not any need for anything in the copyright law as to what is not subject to copyright. That is perfectly well settled now. All that the law needs to do is to add the things that ought to be brought within the protection; to enumerate those things that are entitled to protection.

Mr. CURRLER. Mr. Porterfield, referring to that part of subdivision a which reads "or in a public document of any material in which copyright is subsisting, shall not be taken to cause any abridgment or any annulment of the copyright, or to authorize any use," etc., I may say that Congress at almost every session has passed some special act on that point.

Mr. PORTERFIELD. That is very well—yes, sir; I admit that. I had not gotten down to that. It is very well, indeed. I have known several cases in which Government officials have asked permission to reprint.

Mr. CURRIER. At the last session we passed a special act covering a book of that kind.

Mr. PORTERFIELD. Yes; that is very well. But this enumeration of a publication of the United States Government as the only thing in which no copyright shall subsist is very dangerous. The law is settled now and putting this in must mean something, and therefore it must change the law and must limit it to publications of the United States Government.

Senator MALLORY. Are any of the State supreme court reports copyrighted?

Mr. PORTERFIELD. The reports of the Supreme Court of the United States?

Senator MALLORY. No, no; the State supreme courts?

Mr. PORTERFIELD. Some of them are; most of them are. Very few of them are not; most of them are copyrighted, generally by the reporter.

Mr. CAMPBELL. They are, when the reporter writes up the opinion, are they not?

Mr. PORTERFIELD. The syllabus?

Mr. CAMPBELL. Yes.

Mr. PORTERFIELD. Yes.

Mr. CAMPBELL. Then he copyrights them?

Mr. PORTERFIELD. Yes.

Mr. CAMPBELL. Then you pay three or four dollars for your State report?

Mr. PORTERFIELD. Yes.

Mr. CAMPBELL. And where the order is that it should not be so done, but it is the opinion of the court, then there is no copyright, and you get your volumes for much less?

Mr. PORTERFIELD. Generally that is so.

Mr. CAMPBELL. We have had our own experience with it.

Mr. PORTERFIELD. The reports of the Supreme Court of the United States are copyrighted, I believe, by Banks Brothers.

Mr. CAMPBELL. It may be prevented, Senator, by the court itself.

Senator MALLORY. Yes; I know that.

Mr. CAMPBELL. But where it is not your reports are very expensive, because the reporter will invariably copyright them.

Senator MALLORY. I do not think any of them should be copyrighted.

Mr. CURRIER. Would there be any danger in that provision if you made the amendment suggested by the Senator, "judicial opinions," making that general?

Mr. PORTERFIELD. I think not, then, though it seems to me that if it was simply limited to saying that no copyright should be affected by publishing it in any publication of the Government, the law is so well settled now as to the things that are not subject to copyright that I do not see any necessity for changing the language of the present law.

Mr. CURRIER. The question is, should this bill pass as to the other sections, whether you might not need that. I am not speaking about existing law; but suppose this was the existing law, Mr. Porterfield?

Mr. PORTERFIELD. Then, if this were the existing law, if that provision about things in which no copyright shall subsist were omitted, the law would remain exactly as it is now.

Mr. CURRIER. But might not other sections of this bill extend the right so as to cover judicial opinions unless you excepted them directly?

Mr. PORTERFIELD. Then, in that view, I should think it ought to say "in any publication of the United States Government or any State government, and in judicial opinions." I think the State governments ought to be included in this as well as the United States Government.

A GENTLEMAN. How about city ordinances?

Mr. PORTERFIELD. I imagine that would come within the term "State government," as being a part of the State government.

The question of the formalities for securing copyrights and maintaining them is a very important feature of the law, and this bill is particularly indefinite as to that. These provisions are contained in sections 9 to 17, inclusive.

It is first provided in section 9 "That any person entitled thereto by this act may secure copyright for his work by publication thereof with the notice of copyright," and then it goes on to say that it shall be sufficient if this notice of copyright is affixed to the bulk of the edition published. As far as the notice of copyright is concerned, it seems to me very important that every copyrighted thing should bear on its face some indication that it is protected, and for how long it is protected. The interests of the public certainly require that. It is impossible for everybody who wishes any information in that regard to come down here to Washington and overhaul the Copyright Office. The country is too large for that sort of thing. If each copyrighted thing has a notice on it which shows that it is copyrighted for a certain number of years, that is prima facie evidence that it has that protection. If anyone wishes to make further investigation, he then can consult the Copyright Office and see if it has in fact been entered.

The provisions of this bill are wholly vague and uncertain as to what one must do to obtain a copyright. A great deal is said in this bill about registration, but the bill does not require registration. In one place it speaks of the necessary registration. These provisions

in regard to registration are all directory. None of them is mandatory. And if the copyright is not recorded I can not see that the copyright is vitiated at all, because, as I said before, there is no provision in it for divesting a copyright which is once vested by publication with the notice of copyright.

Section 5 says that the application for registration shall specify certain things, and a person may obtain registration by complying with the requirements of this act. Section 15 provides that if failure to make registration has occurred by the error or omission of any administrative officer or employee of the United States it shall be permissible for the author or proprietor to secure the necessary registration within the period of one year. And section 53 provides that whenever deposit has been made in the Copyright Office of the title or copy of any work under the provisions of this act he (that is, the register of copyrights) shall make entry thereof, and certain fees are to be paid for it.

Now, it seems certain that that bill contemplates registration of the title, but it is just as certain that it does not absolutely require it, and if the copyright proprietor does not have his copyright recorded, it does not affect him at all. He still has his copyright, and the Copyright Office and the public are wholly in the dark about it; and there would be no way of telling them when that copyright began and when it would stop. The whole thing is vague.

The provision here about securing the necessary registration within one year is the only thing on which there could be a contention that the title must be registered. And then as to the notice—he is only required to put it on the bulk of the edition published. That seems to mean the edition by the publication of which he gets his copyright.

The LIBRARIAN. It was not intended to mean that.

Mr. PORTERFIELD. Well, I am now speaking—

The LIBRARIAN. I only suggest that to save your own time.

Mr. PORTERFIELD. Yes, sir; but we have got to consider this bill as it stands.

The LIBRARIAN. It means every edition published.

Mr. PORTERFIELD. It does not say so, though, and in that respect it changes the law as it is now. That is one of the variations.

As far as these formalities of obtaining copyright are concerned, there is only one way of securing strict performance, and that is to make the copyright depend on it. I believe that is the only method. If a man's copyright does not depend on his doing these things, he will not do them. He will not have his type set in the United States; he will not have his title recorded, and he will not have his notice of copyright.

The CHAIRMAN. Mr. Porterfield, you have already exceeded your time. Have you nearly concluded the statement which you desire to make?

Mr. PORTERFIELD. Yes, sir. I would like to say, Mr. Chairman, a few more words here. I do not suppose it is necessary for me to go into the question of the period of copyright. That is a question for the Congress in its wise discretion.

The CHAIRMAN. It is a question of discretion.

Mr. PORTERFIELD. Yes, sir.

Mr. WEBB. In that connection, do you think the period set in this bill is too long—life and fifty years?

Mr. PORTERFIELD. Oh, yes; I think it is much too long. I think the present law gives ample time.

This bill omits one very important provision, and that is the provision of the act of March 3, 1891, in regard to the entry of books consisting of several volumes. There was formerly some uncertainty as to how they ought to be entered. Now, the act of March 3, 1891, contained a provision that each volume of a book in two or more volumes, when such volumes are published separately, and the first one shall not have been issued before that act should take effect, and each number of a periodical should be an independent publication, subject to separate copyright. That is a very important provision, and it is entirely omitted from this bill. This bill talks about periodicals, and all that sort of thing, but does not contain any provision in regard to whether you shall copyright them separately or annually, or by volumes, or how. Presumably it is intended to repeal that clause and let the law stand as it was before.

Mr. HINSHAW. This repealing clause in section 64—

Mr. CURRIER. Mr. Hinshaw, we have been over that.

Mr. HINSHAW. Oh, have you? Excuse me; all right.

Mr. PORTERFIELD. That is cut out.

Now, the remedial provisions of this bill are very extraordinary, and particularly the provision in regard to the venue of suits. It is provided that any court—[Mr. Porterfield examined the bill.]

Mr. CURRIER. Please state your objection.

Mr. PORTERFIELD. My objection to it is this: That it authorizes suit to be brought at any place where an alleged infringing work may have been sold.

Mr. CURRIER. You need not take any time upon that. We went over that and discussed, in an informal way, that question last June, and decided that the suit should be brought either where the complainant or the defendant resided.

Mr. LEGARE. Mr. Porterfield, turn to section 7 and give me your idea about that word "subsist." For instance, there is some intimation of including the State reports. What effect will that have on State reports of court decisions already copyrighted?

Mr. PORTERFIELD. I do not think that would have any effect on State reports already copyrighted, because it is very well settled that the copyright on law reports covers only the original work done by the reporter—that is, the syllabi that he has written are protected, and any statements of facts he may have made are protected; but there is no protection of the opinion, and anybody can reprint those opinions. That is the law now.

Mr. CURRIER. You would strike out the word "subsist" and put in the word "issued," or something of that kind?

Mr. BONYNGE. "Granted," or something of that kind. The use of the word "subsist" might seem to imply that if one now exists in such a work it should take away the copyright. It says that "no copyright shall subsist in any publication." If one is now existing, would it have the effect of destroying the copyright to use the word "subsist?"

Mr. PORTERFIELD. I think not, sir.

Mr. LEGARE. It looks that way to me—section 7.

Mr. PORTERFIELD. I think that is a bad word.

The CHAIRMAN. Mr. Porterfield, as I understand it, you are opposed to this bill in its entirety?

Mr. PORTERFIELD. In its present form. There are some provisions—

The CHAIRMAN. You have no amendments to suggest to it?

Mr. PORTERFIELD. I have amendments to suggest to the present statute.

The CHAIRMAN. Have you a bill that you desire to suggest to the committee to take the place of this?

Mr. PORTERFIELD. Yes, sir.

The CHAIRMAN. Have you prepared it?

Mr. PORTERFIELD. I have it pretty nearly done; I have not completed it yet, however.

The CHAIRMAN. How soon will it be completed?

Mr. PORTERFIELD. I think I can finish it within a couple of weeks.

The CHAIRMAN. We think that you should present it by a week from Monday, at the same time that you present your amendments.

Mr. PORTERFIELD. You will allow a week for that, too?

The CHAIRMAN. A week from next Monday.

Mr. PORTERFIELD. Yes, sir—well, I will present that.

The CHAIRMAN. Very well.

Mr. PORTERFIELD. Thank you.

The LIBRARIAN. Does Mr. McKinney desire to be heard at this point, before Mr. Steuart speaks?

Mr. McKINNEY. I think this time will do as well as any, if it be the convenience of the committee.

The CHAIRMAN. How much time do you wish, Mr. McKinney?

Mr. McKINNEY. Very little—ten minutes, perhaps.

The CHAIRMAN. Ten minutes will be given you.

**STATEMENT OF WILLIAM M. McKINNEY, ESQ., OF NORTHPORT, LONG ISLAND.**

The CHAIRMAN. You are connected with the Edward Thompson Company?

Mr. McKINNEY. I represent, Mr. Chairman, the Edward Thompson Company, law publishers, of which company I am vice-president. I also represent that company as one of its counsel in important copyright litigations which are now pending, in which the Edward Thompson Company is both complainant and defendant; and I represent myself as a lawyer, a law writer, and an editor of law books.

Speaking of pending copyright litigation, I desire to call the attention of the committee to the fact that there is nothing whatever in this bill disclaiming its application to pending litigation, and under the rule of law relating to the interpretation of statutes, everything that is remedial in this bill would apply to pending litigation. Whatever copyright bill is enacted, I am sure the committee will agree with me, should contain some clause disclaiming its applicability to present litigation, because the rights that have grown up and are in litigation ought to be settled by the law as it existed at the time those rights were claimed, or the violation was claimed, and not by a law such as it is proposed now to enact.

Mr. McGAVIN. Can a law that is passed now interfere with that?

Mr. BONYNGE. So far as the remedy is concerned.

Mr. McKINNEY. Certainly, so far as the remedy goes, this law

would be retroactive, and therefore the remarkable provisions contained in this bill, the astounding provision with regard to the impounding of literary property, and its destruction, almost, its practical destruction, on a mere claim of infringement, would apply to pending litigation.

I shall not pretend, Mr. Chairman and gentlemen of the committee, to review the multitudinous details in which I regard this bill as very deficient, because it would be impossible to do that even in an argument extending over a day. Mr. Porterfield has covered a number of the most important ones in his oral address, and in his written brief, I think, handles the details of the subject exceedingly well. I recommend the perusal of that brief to the careful consideration of this committee. I only desire to say, along general lines, that it has struck me after very careful study of the bill and some years experience in copyright law and in copyright litigation, that this committee will make a serious mistake if it attempts to build up a copyright law on this bill. I do not believe this bill can be made the basis, by excision or inclusion, or by amendment, of a just and fair bill. It is uncertain, it is vague, it is verbose, and exceedingly voluminous. It unsettles a whole lot of law that has grown up and is the accumulation of the copyright learning of our judges for many years. We are just beginning to have a body of copyright law in this country, and if this bill is passed no copyright lawyer can advise a client, and the courts are going to be utterly at sea, it seems to me, until years of litigation have in some way settled some of the vague provisions of this bill. I sincerely recommend to the committee not to attempt, even, to build up on this structure a change in our copyright law.

It seems to me that as the copyright of music and the reproduction of music by mechanical contrivances is a very important and controversial subject, it might be well for the committee to deal with that subject in a separate bill—a musical copyright bill, for instance, such as just passed Parliament. If it is very important, in the discretion of the committee, that our present law relating to the importation of foreign books and the international copyright matters are not well settled, that might very well receive the attention of the committee. But we are going beyond that. We are unsettling the whole copyright law of the United States. We have an attempt here at a copyright code which I can see, from the remarks here made by the members of the committee, is not understood by any of us. How are the courts, how are the publishers, how are the members of the bar going to understand it?

I wish also to call the attention of the committee and claim its serious consideration for the part of the bill (I have not in mind the section, and it does not matter) which deals with the jurisdiction of the courts. I think that none of the learned counsel who sit on this committee will say that that is fair or proper, or that it could possibly be wise to sustain that remarkable provision.

In concluding I desire to say that the various remarkable provisions in this bill relating to the sale of books, to the jurisdiction of courts, and the impounding of published matter—its destruction, almost—to the changing of the method of securing copyright, the remarkable provisions relating to notice, which unsettle all the law



upon that subject, make it seem to a casual observer as if there was some purpose that we can not divine to be subserved by this bill. I do not know, I do not charge, that there is such a purpose; but these provisions are so remarkable that it inclines one to believe that there might be some private purpose which none of us can understand. I thank you.

Mr. BONYNGE. Mr. McKinney, what is your view as to the proper life of a copyright?

Mr. McKINNEY. There is so much to be said on both sides of that subject, and it is so largely a matter of discretion, that I hardly have an opinion. The law as it stands abundantly satisfies me, and it satisfies the publishing house which I represent. But if authors think it unfair and desire a further extension of time for their copyright, I can not see any reason why they should not have it.

The LIBRARIAN. Mr. Chairman, is it your desire to hear Mr. Steuart next?

The CHAIRMAN. Mr. Putnam, the committee would like to hear all the opponents of the bill.

The LIBRARIAN. In the line of criticism?

Mr. PETTIT. Mr. Chairman, may I suggest one further amendment regarding clause g of section 1?

The LIBRARIAN. That will be taken up later.

Mr. CURRIER. That is to be taken up later.

Mr. PETTIT. I thought this was the appropriate time.

Mr. CURRIER. No; we have decided to let section g go over.

The LIBRARIAN. It was, Mr. Chairman, on the supposition that the committee would like to hear any further criticism that may be available of the nature of Mr. Porterfield's that I asked Judge Walker just now whether he had anything to add of the same kind that he offered in June last. He will say for himself.

Mr. WALKER. I have a few points.

The CHAIRMAN. How much time do you wish, Mr. Walker?

Mr. WALKER. I want to speak to the committee in respect mainly to the music matter.

The CHAIRMAN. That matter is not at the present time under consideration.

Mr. WALKER. I understand so; but Mr. Putnam told the committee a few minutes ago that I had some light to throw upon other parts of the bill and that this was the proper time to do that.

The CHAIRMAN. Yes.

Mr. WALKER. And if the committee desires to hear me ten minutes will be enough for that purpose.

The CHAIRMAN. Very well; you may be heard for ten minutes, until half past 11.

Mr. WALKER. In section 22 of the bill I suggest that an amendment be made by inserting the words "or legal representatives" after the word "assigns" in line 6 of page 16. No argument is necessary to indicate the desirability and necessity of that insertion, and its omission was probably inadvertent.

I regret that the copy of the bill I have is not the one I have made notes upon, and I will have to rely upon my memory.

The CHAIRMAN. Judge Walker, if you prefer you may submit in writing your proposed amendments.

Mr. WALKER. That will be better; thank you.

The CHAIRMAN. Have you any other suggestions you wish to make?

Mr. WALKER. I wish to speak about the subject of the musical branches of the bill.

The CHAIRMAN. That is not at present under consideration.

Mr. WALKER. No; I understand that.

The LIBRARIAN. I think Mr. Ansley Wilcox, of Buffalo, would like to submit an amendment and some comment which will be appropriate here, perhaps.

**STATEMENT OF ANSLEY WILCOX, ESQ., OF BUFFALO, N. Y.**

The CHAIRMAN. Will you not state your name to the stenographer?

Mr. WILCOX. Ansley Wilcox.

The CHAIRMAN. What is your profession or business?

Mr. WILCOX. I am a lawyer, Mr. Chairman.

The CHAIRMAN. And whom do you represent?

Mr. WILCOX. I am here representing a number of large lithographic concerns who are united under the name of the Consolidated Lithograph Company, and whose business, besides the general production of lithographic prints and illustrations and a general printing business, is principally that of poster printing—printing large illustrations.

The CHAIRMAN. How much time do you wish?

Mr. WILCOX. A very few minutes, sir. Five or ten minutes will be enough for the definite suggestion which I have to make.

Quite aside from my representative capacity, Mr. Chairman, I have become, in attendance upon the conferences and in attendance here yesterday and to-day, interested in various features of this bill; and I have some suggestions which I shall venture to make, either orally or in writing, which do not specially concern my clients, but simply grow out of my interest in the subject and my desire to promote what I believe to be an admirable effort to improve the condition of our law of copyright.

Originally the clients whom I represent, as manufacturers of lithographic and other prints, and seeking to improve the conditions of that business and to improve and render more artistic the work which they put out to the public and persuade the public to buy, were concerned with the draft of the proposed bill as issued last spring, and were not satisfied with the provisions which it contained for the protection of their manufactures—prints and engravings. At present they are satisfied with sections 4 and 5 of the bill—amply satisfied that their products are completely protected. They were anxious about that subject because they had recently been parties in a very important litigation in which I was concerned, and in which the court of first instance and the circuit court of appeals had held, substantially, that posters were not copyrightable at all, and threatened to undermine the security of their entire business. That was the case of *Bleistein v. Donaldson*, which I brought for the Courier Company, of Buffalo, or for Mr. Bleistein, its president, in the circuit court for Kentucky, and in which the judge, instead of assessing our damages

as a matter of course, as we thought he was going to do, threw us out of court upon the ground that our posters were not subjects of copyright at all, on the ground that they were not highly artistic and original works and did not satisfy his artistic taste. The circuit court of appeals affirmed that judgment, and it took an appeal to the United States Supreme Court to reverse it. It was reversed there by a court divided against itself, by a vote of seven to two.

Senator MALLORY. That is not unusual. [Laughter.]

Mr. WILCOX. Having just been through that experience, we are very anxious that no change in the copyright law should undermine the copyrightable quality of these posters and prints upon which our entire business depends, and that is sufficiently assured by the language of the bill as it stands to-day.

But our experience in this suit led us to one practical view of the matter which would seem to be directly contrary to our own interest, and yet which is in our own interest, and also, as I believe, in the interest of justice. That is connected with the question of damages—the liquidated damages which the law, as it stands to-day, allows to be recovered in such cases, and which the proposed law undertakes to modify.

Our experience in that case is instructive. I sent a representative of my firm to Covington, Ky., to enforce our remedy, and attach or seize a number of piratic prints reproducing some prints which we had copyrighted, on which we had three different copyrights. He found there 30,000 copies of these prints, which were seized immediately by a process in the nature of replevin. Incidentally I may say, in connection with the remarks which have been made here within the last few minutes with regard to the provisions of this bill which permit the impounding of matter of a piratical character infringing copyrights, that the present law permits that, and did permit it in the case I speak of. We absolutely seized, by replevin, 30,000 copies of infringing prints; and the penalty fixed by the present law is \$1 a copy, or \$30,000. I believe that the reason why we failed to succeed in that case in the court of first instance was that our penalty was so large, and that if we had had a penalty of a smaller amount the judge would have looked at the thing in a different manner, and might have been willing to have found that we were protected by the copyright law if we had not been protected to such an extravagant extent. The damages, of course, were altogether incommensurate with any suffering which we had endured or with any profit which our opponent had derived from the practice.

It was in view of that experience that the suggestion was made last spring that the penalty should be cut down to a maximum not exceeding \$5,000, and that there should always be a minimum penalty of some kind, which has been put into the bill as now before you at \$250, so as to afford at least some compensation to a party who has to sue an infringer in another jurisdiction—that something should be given to him even if he seizes only one or two copies of an infringing print or publication of any kind; and that he should never be allowed damages which would frighten the judge or frighten the jury into trying to defeat the law, which is substantially what happened, I think, in our case.

Senator MALLORY. May I ask you a question before you go on?

Mr. WILCOX. Yes, sir.

Senator MALLORY. Is it your experience that the present law permits a party whose copyright has been infringed to take possession of the pirate's articles of pursuing his occupation?

Mr. WILCOX. There is distinct confusion in the law, as I understand it, and in the rulings of the courts upon that subject to-day. I have been asked since I came down here by lawyers from other jurisdictions how the present law is enforced, and whether the new law should not contain more explicit provisions as to how the infringing articles should be impounded.

I think it should, Mr. Chairman and gentlemen. I think the law should state distinctly in what way and by what process the act of the court in impounding the articles which are claimed to violate the law should be enforced—whether it should be by replevin or by attachment or by some special process. My experience in that case was that the remedy by replevin worked in our instance, but it was a matter for very serious thought with us as to how we should go about exercising the remedy which the law gave us in general terms to seize the infringing articles. We did not know, and we had to reason it out by a study of the common-law jurisdiction of the courts in Kentucky and their remedy by replevin. We came to the conclusion that that was the nearest process that we could find, and we proceeded by an action in the nature of replevin at common law, and gave a bond and replevied the infringing prints, and got the marshal—

Mr. CURRIER. Did the court hold that you should do that, or did it pass on that point?

Mr. WILCOX. That particular question was not raised, sir; but they raised every question that they possibly could, and I think they were satisfied that it was the proper remedy in Kentucky. But I am advised that that particular remedy has been denied in other jurisdictions, and that there is confusion in the law as it now stands. If so, I think the new law should state how the impounding process should be made effective and just exactly what remedy the court will allow parties to use.

The CHAIRMAN. Have you an amendment which you wish to suggest?

Mr. WILCOX. In that particular, sir, I have not. The amendment I propose to offer is in respect to the phraseology used in section 23, in subdivision b of the bill, in respect of the measure of damages. I had hoped to have a chance to talk to Mr. Steuart and the gentlemen who were responsible for drafting the bill, in advance, and to submit this to them and find out their reasons for the phraseology which they have used, but I have not been able to do it, and therefore I submit this now to the committee for consideration by the committee and others:

Substitute for the last half of subdivision b, beginning in line 12 with the words "or in lieu thereof." As to the first part of subdivision b, Mr. Chairman, I would like to say that I have heard it severely criticised, and I do not join in any of the criticisms upon it, except to say that ordinarily, in my experience, it will be inef-

fectual anyhow. So far as I have been able to observe, it is very seldom possible for the people who claim an infringement of copyright either to prove any very large or very material damages on their part or to prove any considerable profits on the part of the other party. And I think that that remedy, that portion of the remedy by way of damages, will very seldom be available, and that the statute ought to provide liquidated damages, or it will be ineffectual; and that the liquidated-damage provision should be made definite and explicit and at the same time so reasonable that it will not frighten either a court or a jury in the other direction, as I have said before.

In that view I propose to substitute this for the last six lines of that subdivision as it stands:

Or in lieu of such damages and profits the plaintiff may elect to claim and thereupon may recover as liquidated damages, and not as a penalty, an amount to be assessed as hereinafter stated, but such damages shall not in any case be less than \$250 nor more than \$5,000, except that where a wilful or intentional infringement is found the court, in its discretion, may double or treble the liquidated damages, even though this may raise the amount above \$5,000.

And then following that, Mr. Chairman, in subdivisions 1, 2, 3, and 4, where the different amounts are stated, and where in each case occur the words "not less than," I would strike out the words "not less than," so as to make the amounts definite, distinctly liquidated damages. In each of those subdivisions it now reads that the damages shall be not less than \$10, not less than \$50, not less than \$100, and so on.

The CHAIRMAN. You can make it a sum absolute?

Mr. WILCOX. A sum absolute as liquidated damages, as what we lawyers understand to be liquidated damages, with a maximum of \$5,000 and a minimum of \$250—liquidated damages between those sums, but with the power on the part of the court to double or treble the damages in case of a willful and intentional violation of the law.

Senator MALLORY. Do you mean by that that the judge may, on his own motion, raise the amount of damages?

Mr. WILCOX. On motion of the parties, I assume, not on his own motion, the judge may double or treble the damages.

Senator MALLORY. Do you take that matter away from the jury?

Mr. WILCOX. No, if the jury has assessed damages.

Senator MALLORY. If the jury has assessed damages, say, at \$500, you say the court—

Mr. WILCOX. The court may, upon motion, upon a finding of wilful wrongdoing—that question could be submitted to the jury as a special question, whether or not the infringement was willful and intentional.

Senator MALLORY. The point I want to get at is whether the use of the word "court" there does not confine it to the judge as to increasing the damages?

Mr. WILCOX. I suppose, sir, that the ordinary practice is—it is with us in the State of New York—that where double or treble damages are provided for, the jury finds single damages, and the court may double or treble them.

Senator MALLORY. The court may fix the doubled or trebled damages?

Mr. WILCOX. That is the practice with us in the case of willful wrong, and I am following in this suggestion the practice which is quite familiar with us in our State practice in New York (and I supposed it was generally familiar to the bar), in having the jury assess ordinary damages, either in the actual amount or on the basis of liquidated damages, and having the court double or treble the damages in case of willful wrong-doing, by way of smart money or additional compensation.

The CHAIRMAN. The jury finds the fact of willfulness?

Mr. WILCOX. I think that question should always be submitted to the jury as a special question, and let them find whether it was willful or otherwise.

Mr. Chairman, by way of comment on the section as it stands to-day I confess that I can not understand it. I have studied it and puzzled over it, and I do not know what its effect would be. It reads "or in lieu of actual damages and profits." I do not like the use of the word "actual" there, because liquidated damages are supposed to be actual damages, too—"or in lieu of actual damages and profits, such damages as to the court shall appear just." That appears to contemplate that the court shall assess the damages, which is contrary to my idea of the ordinary practice. I do not know precisely what the gentlemen who put that language in there meant by it—"to be assessed upon the following basis." Then come the maximum limit of \$5,000 and the minimum of \$250; and then, when the basis comes to be set forth in each case, it says "not less than \$10," thus imposing on the court a minimum amount with no maximum amount at all except the general maximum of \$5,000, and leaving the court to assess the damages.

Now, frankly, I do not know, after some considerable study that I have given to the bill, just how that system would work out. And I have attempted to substitute for it a system which is more comprehensible, to my mind as a lawyer, and which I think would work justice to the complainant (and so far as I am here in a representative capacity, I am representing persons who expect, if at all, to be complainants in such lawsuits), and yet which would be so far from unjust to possible defendants that we would find our remedy efficacious, and not be misled by it as we were in the other suit that I spoke of.

Mr. CURRIER. Can you suggest any modification of paragraph c and paragraph b of that section, as to the impounding?

Mr. WILCOX. I have made the suggestion already, Mr. Chairman.

Mr. CURRIER. Those are rather drastic provisions, are they not?

Mr. WILCOX. I do not think that is drastic at all. I do not think it is any more drastic than the present law; certainly not any more drastic than the present law was in our case. We gave a bond of \$250, upon which we seized 30,000 copies of infringing prints, and put a stop absolutely to the defendant's sale or distribution of those copies at that moment. Of course we were liable on our bond, and they had the ordinary remedy to move to increase the bond, which they did not do in that case.

Mr. BONYNGE. Is there any provision in this bill for giving bonds when these goods are impounded?

Mr. WILCOX. None whatever, sir; neither is there in the present

law. We had to work out that remedy by replevin, out of our own heads. The present law is wholly vague and indefinite upon that subject.

Mr. BONYNGE. We are attempting to model a new law now, and we do not want to leave it vague and indefinite.

Mr. WILCOX. I agree with you entirely, sir; and I suggested before that in connection with the provisions of the new law for seizing and impounding goods or infringing articles you should be quite definite and explicit in stating the remedy, and then perhaps should leave it to the courts to make their own rules as to how that remedy should be exercised. If you mean that it should be done by replevin, I think you should say so; or if you mean that it should be done by attachment, I think you should say so; or if you mean that it should be done by a direct impounding order of the court, which is the only other remedy that I can conceive of, I think you should say so, and authorize the court to make rules for giving effect to that remedy and to require security and otherwise to protect an innocent defendant from a vicious attack.

Mr. LEGARE. Which do you think is the most feasible?

Mr. WILCOX. I think replevin is the best known and the most generally applicable remedy.

Mr. CURRIER. Would you cause the destruction of all the machinery used to reproduce?

Mr. WILCOX. Would I do so, sir?

Mr. CURRIER. Yes.

Mr. WILCOX. I think it would be a very hazardous thing for a plaintiff to destroy machinery.

Mr. CURRIER. Machinery that might be used for some other purpose?

Mr. WILCOX. I think it would be very hazardous. I would not do that at all.

Mr. CURRIER. Would you leave that paragraph, then, as it now reads?

Mr. BONYNGE. That would be paragraph 23, subdivision d?

Mr. CURRIER. Subdivision d.

Mr. WILCOX. I certainly would not leave the remedy in such shape that it could be abused. I think that would not be a very dangerous remedy, because a defendant whose machinery was seized would certainly go into court immediately and ask for a bond that would indemnify him completely for the value of that machinery—his printing presses and other machinery, and even the plates, which can be melted down and used over again, or lithographic stones, which, after an infringing print has once been put upon them, can be erased in a very few minutes and the value of the stone restored. To destroy articles of that kind would be barbarous, I think, and this clause in reference to destruction certainly was not intended to accomplish that; and I do not think it would in practice, because the defendant would protect himself.

Mr. CURRIER. I think it would be helpful to the committee if you would formulate an amendment carrying out your idea as to how the remedy should be provided.

Mr. WILCOX. I started to do that, sir, and then it seemed to me this morning in looking at it that it was doubtful whether that

amendment should not be made in a subsequent section which provides more explicitly for the impounding process. I think that is the place where it should come rather than here—perhaps with some slight amendment to that portion of section 23. I shall be glad to do that, however, and will try to do it before I go away to-day.

I am going to submit, Mr. Chairman, in addition—this is not in the line of the remarks I have been making—a draft of an amendment to section 1 which will answer, I think, a good many of the objections which have been made to that section and which, to my mind, will very greatly improve it. But I will not take up time by discussing that now, although I shall be very glad to discuss it, either publicly or privately, with some of the gentlemen of the committee later.

In answer to a question which the chairman of the House committee asked of several gentlemen yesterday, as to whether they would object to striking out from section 1, subdivision b, relating to selling, distributing, exhibiting, etc., I would like to say that to strike out subdivision b would cut the vitals out of the entire bill, and that that would be a fatal step to take without providing some substitute for it. I say that because that is the section which embodies more of the meat of the copyright law than any other one clause in the bill. It can not be stricken out, but it plainly is susceptible of misconstruction; and I think that misconstruction can be obviated by an explanatory clause added at the end of it, permitting any person who has become lawfully the owner of a copyrighted article to use it just as he can use it to-day, either by selling it or by distributing it or by exhibiting it or by doing anything with that particular article which he owns which he can do under the law as it stands to-day. I am sure there was no intention to limit that use, and that can be so stated in a single proviso at the end of that section.

But besides that I think that subdivision a and subdivision h as they stand in that section to-day, taken in connection with one another, are confusing and that the two should be taken up and worked in together, and that the line at the head of subdivision a “for the purposes set forth in subsection b hereof” is wholly unnecessary and misleading and should be stricken out entirely. And I will submit an amendment embodying those items.

The LIBRARIAN. Mr. Wilcox, will you communicate to us some general impressions of the bill as you see it? You have criticised certain particular sections, but you have also examined the bill as a whole?

Mr. WILCOX. I have. I have been trying to be brief in my remarks. I fear I have exceeded the time I stated.

The CHAIRMAN. That is all right.

Mr. WILCOX. But I want to say on behalf of the clients I represent—I think I did say it—and on behalf of myself as a lawyer, as having studied the bill, that I consider the general framework of the bill excellent. I entirely disagree with the gentlemen who say that the bill is not well conceived and in general well worked out. While I do think that it needs amendment in some particulars that I have mentioned and possibly in others, and while I am impressed with some of Mr. Porterfield's suggestions that in other respects the bill may need amendment, I think you have an admirable frame-



work to work upon, and that you should now go ahead and preserve the very carefully constructed framework of this bill and improve it and make it a model copyright law.

(Mr. Wilcox later submitted his proposed amendment to section 1, above referred to, as follows:)

That the copyright secured by this act shall include the sole and exclusive right—

(a) To make any copy of any work or material part thereof the subject of copyright under the provisions of this act, or to make any abridgment, adaptation, variation, or rearrangement thereof.

This subsection shall include translations into another language or dialect of any work which is capable thereof.

(b) To sell, distribute, exhibit, or let for hire, or offer or keep for sale, distribution, exhibition, or hire, any copy of any such work, or any abridgment, adaptation, variation, or rearrangement thereof: *Provided*, That this subsection shall not be deemed to prohibit anyone who has lawfully become the owner of a copy or copies of such work from selling, distributing, exhibiting, or letting for hire such copy or copies.

(c), (d), (e), (f), and (g) not changed. Omit (h), included in (a).

The LIBRARIAN. Mr. Alfred Lucking asks not exceeding six minutes, Mr. Chairman, to suggest a criticism. Mr. Lucking is from Detroit, and represents the directory publishers particularly, I believe.

Mr. LUCKING. Yes, sir; entirely.

#### STATEMENT OF ALFRED LUCKING, ESQ., OF DETROIT, MICH.

Mr. LUCKING. Mr. Chairman and gentlemen of the committee, I know how precious your time is, and I will not take over six or seven minutes at the outside.

The CHAIRMAN. Whom do you represent, Mr. Lucking?

Mr. LUCKING. I represent the American Association of Directory Publishers of the United States.

The CHAIRMAN. Are you here to protest against or object to any provisions of this bill?

Mr. LUCKING. I desire to protest against the elimination of some provisions which it has been suggested to eliminate, and in general to pronounce a confirmatory and satisfactory word with regard to the bill, and to direct your attention particularly to two sections, not taking more, as I say, than six or seven minutes at the outside.

Mr. BONYNGE. I understand that your association, then, is satisfied with the bill as an entirety?

Mr. LUCKING. As a whole; and even without amendment they would ratify it. There are minor criticisms which I will not stop to refer to.

As I say, they are in the main satisfied with this bill and would be glad to accept it as a large improvement over the present law. We are eminently satisfied with it so far as it fixes rights and appoints methods of securing those rights. In the matter of remedies for infringements the proposed act is a decided advance and will be of great help in preserving our rights, chiefly on account of section 25—the misdemeanor section.

I desire, at the instruction of the American Association of Directory Publishers of the United States, to express their dissatisfaction with section 13, but to say that they yield their objections for the general good.

There were other expeditious remedies which they urged upon the authors of the bill—practical and useful ones, as they believed—but failing them, they still express satisfaction with the work as a whole.

The chief source of their contentment arises from section 25, that which makes willful and deliberate theft of their property a misdemeanor. I want to urge with all the force and strength of their united body the retention of this provision. To take out this would not only remove the backbone of the measure, but take the heart out of them. They have been robbed and cheated and swindled by irresponsible fly-by-night concerns, which have copied their works which cost them many thousands of dollars to compile, reaped their profits, and then have given them the laugh because of the utter futility of "suing a beggar and catching a louse."

The honest man need not fear section 25, and we want the dishonest ones decidedly to do so. Now, its chief value, gentlemen, will be preventive. Dramatic copyrights have been protected by such a clause since, I think, the year 1897. Mr. Bronson Howard declared before the March conference that whereas before the act of 1897 dramatic piracy was a constant and everyday practice, there had been no occasion, except in one trivial instance, to invoke the criminal law since it was passed. The fact of its existence upon the statute book had been sufficient to deter all infringements. Is this not a splendid testimonial to the efficacy of such a provision and complete proof that no harm can come of it?

I sincerely hope that there is no serious thought of eliminating that provision. It is the chief source of our indorsement of this bill.

Now, just a word with regard to section 32, Mr. Chairman.

I heard what the chairman said with respect to that section—the question of the venue of the action or suit. Now, by the instructions of my clients, I can say that they indorse the principle of paragraph 2 of section 32—that is, with reference to the venue of the action. I noted what the chairman said, that some decision had been arrived at with regard to that. I trust it will be reconsidered somewhat.

My clients indorse the principles of section 32, paragraph 2; that is, that the defendant should be suable where he issues an edition of a directory. He may do a considerable business in a city and never be there personally. He should be reachable there for all consequences of that business. The suit should not be limited to the place where he lives or may be found. But on the other hand, to drag a defendant thousands of miles to defend a suit simply because a single copy of the book is sold there would be a gross abuse of power. We agree to that. We in a measure indorse the suggestion of Judge Walker as a compromise, which is contained on page 114 of the circular or book put out by the library, entitled "Amendments Proposed to the Copyright Bill." I will not stop to argue it before you, but I want to read you a notation made by Mr. Bates, of the Trow Directory Publishing Company, of New York City, secretary of this association, which he made in pencil upon this memorandum. He says:

Example: John Brown, of St. Louis, Mo., goes to New York with a deliberate intention of infringing the copyright of the New York City Directory. When the attempt to serve Brown is made it is found that he has not a permanent office in New York and resides in St. Louis. Now, if the New York copyright proprietor is not permitted to commence action in New York, he is compelled, at great expense, to bring suit in St. Louis or be debarred from redress.

I understand, of course, that that is not exactly correct; but I read that to you merely as a suggestion. I understood the chairman to say the idea was to allow the suit to be begun where the complainant lives. But that will not reach our case. For instance, R. L. Polk & Co., of the city of Detroit, publish directories in 70 or 80 different cities, extending from Washington and Baltimore to Seattle and even to Honolulu, and in some cities where personally the members of the firm probably never go. On the other hand, others residing, for instance, in New Orleans, may publish or attempt to publish in those same cities where they seldom or never appear.

The CHAIRMAN. Where can you safely and justly draw the line?

Mr. LUCKING. I recognize that it is a very serious matter, and that section 32, as drawn, is not as it ought to be at all. It seems to me, as I said, that Judge Walker's suggestion there offers a possible solution, although it is too limited for our purposes. He says or suggests:

Actions arising under this act may be instituted in the district of which the defendant is an inhabitant, or in the district where his violation of any provision of this act has occurred, and wherein the defendant has a regular and established place of business.

The words I would criticise there are the adjectives "regular" and "established." If he has an agent there it should be somewhat broader.

Mr. CAMPBELL. May I ask you a question?

Mr. LUCKING. Yes, sir.

Mr. CAMPBELL. Suppose you desire, and it might possibly be necessary, to invoke the impounding or replevin process. Now, your defendant might not reside there at all, and yet the work might be done there.

Mr. LUCKING. Yes, sir.

Mr. CAMPBELL. How could you do it successfully in the progress of your suit if you limit your action entirely to the place where the plaintiff or defendant resides?

Mr. LUCKING. As I have said, I do not think it ought to be done. Of course if there is an edition—

Mr. CAMPBELL. Does Judge Walker's amendment meet such a situation?

Mr. LUCKING. Perhaps not wholly. No; I do not think it does; but allow me to say this with regard to that: Of course if there is an edition of a work, say, 30,000 posters, in a city, somebody will be in charge of those posters and could be made a defendant, even though he were not the real owner, and that infringement would be reachable. But where a directory, for instance—and of course my remarks are largely directed from that point of view—is issued in a city the party himself should be suable there, not merely his clerks and servants, but he should be suable there, and the courts should have jurisdiction to reach him for all the consequences of a suit, including everything which follows in case of personal service, it seems to me. And if it will be of any help to this committee, I would be glad to frame such amendments as I think might reach the case, having in mind as far as may be all cases.

The CHAIRMAN. We should be very glad to have you do so.

Mr. HINSHAW. It would be necessary for you to have service upon some individual, however, would it not?

Mr. LUCKING. Truly; but that might be done by serving an agent or the person in charge of the place of business.

Mr. CHANEY. Then if you were to add "regular and established place of business" the word "agent" would fit your idea?

Mr. LUCKING. Possibly, though "regular and established" might open a large field of contention as to what was a regular and established place of business.

Mr. BONYNGE. Even the word "agent" might do so. The question might arise, "What constitutes an agent?"

Mr. LUCKING. Yes; so it might. It does now. There are many statutes allowing service upon agents and many disputes as to whether a person is an agent or not.

Thank you very much, Mr. Chairman.

The LIBRARIAN. Mr. David C. Harrington, of Scranton, asks not exceeding three minutes, Mr. Chairman, intending to submit a statement in writing. He just wishes to explain what it is to be.

**STATEMENT OF DAVID C. HARRINGTON, ESQ., OF SCRANTON, PA.**

Mr. HARRINGTON. Mr. Chairman and gentlemen of the committee, I hardly intended to make any remarks when I came here, but I wish to call attention—

The LIBRARIAN. Will you state what your interest is? You are at the head of the International Correspondence Schools?

Mr. HARRINGTON. The company that I represent is the International Text-Book Company, proprietors of the International Correspondence Schools, of Scranton, Pa., giving instruction all over the world by means of correspondence through the mails. Since they have been in business, in the last fifteen years, they have enrolled over 940,000 students. They perhaps correct eighty to ninety thousand papers a month of the students who send in their lessons for correction. In preparing those papers they go to great expense, and they are published in pamphlet form first, in small pamphlets, the size of a book, perhaps not larger than that [indicating]. They are sent out to the students to use, and then new sections, other sections, are sent out to them. Then they are subsequently bound in volumes, and some sets have five or six to ten volumes making a set.

What I wish to call attention to first is that you should frame this act so that in the filing of the copies of these sections of the instruction papers as they come out at different dates there should be nothing left open, but it should be definite and fixed with regard to it. It is in one respect like publishing a series of articles through a magazine. You can copyright each article in the magazine and then publish them in a book afterwards.

The next point is with regard to the notice of copyright. Here is one that is published and copyrighted; the copies are filed here in the office at different dates. I had a contest in New York in which the question arose, "When you get out a new edition, what notice of copyright must you give?" And I finally sustained the position that if you gave the original notice of copyright that was sufficient. But still it is an open question, and you will see in our publications that we put in as many different dates as there are dates when there

were papers filed here. That should be made clear, that we are right in that.

The third question is with regard to the question of damages. If anyone could take our books, which we have prepared at an expense of fifteen or twenty or twenty-five or fifty thousand dollars to get up the different courses, and rewrite them to make them clear, so as to give a student just the information he wants in his particular line of business—why, if he only had to pay \$5,000 the measure of damages would be entirely insufficient.

Next, with regard to the impounding, etc. In Pennsylvania our practice is that if equity once acquires jurisdiction it has it for every purpose; and I would give the courts of equity, in matters involving the question of copyright, equitable jurisdiction to include all the questions, so that they may issue an order to impound anything they want and hold it pending the litigation, or do whatever might grow out of it, so as to avoid a multiplicity of suits.

Thanking you for giving me the little time that you have, I should like to write and submit to you some thoughts in regard to this subject.

The CHAIRMAN. How soon will you do that?

Mr. HARRINGTON. I shall try to do it within the next day or two. I have got to go to St. Louis from here on some business, and shall not have an opportunity to get it to you within a week unless I do it while I am here.

The CHAIRMAN. Very well.

Mr. HARRINGTON. So I will try and give you my ideas a little more explicitly before I leave. I thank you for your attention.

INTERNATIONAL CORRESPONDENCE SCHOOLS,  
Washington, D. C., December 8, 1906.

HON. ALFRED B. KITTEDGE,  
*Chairman Senate Committee on Patents, and*

HON. FRANK D. CURRIER,  
*Chairman House Committee on Patents.*

SIR: The International Textbook Company was incorporated to do a printing and publishing business in 1890, the object being to give instruction by correspondence through the mail. For years it used the name "International Correspondence Schools" as a trade name. In 1901 it obtained a charter for it and owns all the stock and manages it. Its object is to give technical education in the mechanical engineering, electrical engineering, mining, and all the different branches taught in technical schools and colleges. It prepares its books for the use of its students to give them all subjects necessary for them to know in their particular course, trade, or business and to leave out everything that is not necessary for them to study and as times change and there are new improvements and new inventions; it writes and rewrites its books for the use of students so as to keep them up to the very latest date possible, and this requires the getting out of new editions, altering and revising them as occasion requires. They are published in the first instance in pamphlet form with paper covers, and, taking for example its arithmetic, which is now in its seventh edition and contains 120 pages, it is divided into sections of about 24 pages each. These originally were copyrighted separately. They are also bound together, and its volume of mathematics includes: Arithmetic, 120 pages; algebra, 116 pages; logarithms, 20 pages; geometry and trigonometry, 75 pages, with questions and answers about each of the different sections. The sets of books in the different courses vary from two to ten.

It is therefore desirable, first, that the act of Congress should state specifically the method or manner in which the composite book or one published in several sections shall be copyrighted and how it required that copies of the same shall be filed in the office of the Librarian of Congress. The book to which I just referred is entitled "Mathematics," and it has all of the different subjects contained in it as above stated. On the title page it is called "I. C. S. Reference Library—A series of text-books prepared for the students of the International

Correspondence Schools, and containing in permanent form the instruction papers, examinations questions, and keys used in their various courses. Arithmetic, elements of algebra, logarithms, geometry, and trigonometry. Scranton, International Text-Book Company."

As above stated, it is therefore desirable to have the information with regard to the filing of the two copies and the title-page be specifically stated, so that there may be no mistake about it.

Second, with regard to the notice of copyright. The bound volume in question to which I am now referring has been republished five times, and consequently has on the page next to the title-page a notice of copyright in 1897, 1898, 1899, 1904, and 1905. The arithmetic has been copyrighted in sections seven times, and this is also printed on the second page; algebra, eight times; logarithms, two times; geometry and trigonometry, seven times, and the keys to the different parts, five times.

The question has arisen in the company's business in which other parties have copied from its copyrighted instruction papers and books. At first it only put on the second edition the date of the last copyright, and the parties who were sued for infringing on the copyright made the claim that by reason of the omission of the date of the first copyright that it became public property. Some of the text-books on copyrights state that if all the dates are not put in it is lost, and the copyright privilege is lost and that the book becomes public property as to all but the additions and alterations. In one case in New York I succeeded in sustaining our contention that one notice was sufficient, relying upon the case of *Lawrence v. Dana*. I suggest, however, that it would be advisable, perhaps, to state in the notice of copyright that no date of copyright need appear and that the publishing of revised editions with alterations, corrections, and additions to it and giving the notice of copyright by the name of Copr. or "C." inclosed within a circle followed by the name of author or copyright proprietor as registered in the Copyright Office will be sufficient notice to maintain the copyright property not only in the revised book, but in the original book or books of which it is a revised copy.

Third, as to damages, section 23. The limiting of the damages to \$5,000 may be entirely inadequate. The International Text-Book Company expends thousands of dollars in preparing and writing its books. These books which are furnished to students in bound form are loaned to them, and they are useful to the company in its business, and they wish to restrict the use of them to its students, so as to get other students to take courses and pay for the instruction. If other persons can reprint the books and give instruction by correspondence to people, no one would write and prepare a book, but all he would have to do would be to pay \$5,000 for the use of a book that has cost another party \$25,000 to prepare, and the limiting of the amount of damages recoverable to \$5,000 is entirely inadequate. I would suggest, therefore, that the maximum amount of damages be stricken out of the act and that the publishing party be permitted to recover the actual damages which he can prove he has sustained upon the trial of any particular case.

Lastly, as to the jurisdiction of the courts and the form of action to obtain possession of copies of copyrighted books which a defendant is wrongfully reproducing and selling. In equity all the remedies to which he may be entitled to under the act should be obtained in one action in equity. Courts of equity have jurisdiction for the purpose of preventing a multiplicity of actions and giving relief in every case as may do justice. In Pennsylvania the ruling is well settled that if the court of equity obtains jurisdiction over the subject-matter in any case it may go to the extent of entering any decree in the case which it may be required, although if the jurisdiction of the court of equity had not been obtained in the first place to obtain relief for damages the plaintiff might be relegated to an action at law for damages. As, for instance, if he applies for specific performance of contract to compel the defendant to make a conveyance of real estate, and before the suit is commenced the defendant has conveyed the property to another without notice, so that at the end of the suit he can convey it because another party has obtained rights without notice, the courts will ascertain the damages which the plaintiff has sustained and give a decree for the amount in damages. It may be a saving of litigation if this jurisdiction is given the court and to have it specifically stated in the bill.

Respectfully,

DAVID C. HARRINGTON,  
*Attorney for International Text-Book Company.*

The LIBRARIAN. I know of no reason, Mr. Chairman, why Mr. Steuart should not be heard now.

The CHAIRMAN. We shall be glad to hear him.

The LIBRARIAN. May I state, for the information of the committee, that the two advisory committees of the bar association, who were represented at the conferences, were one of the American Bar Association, consisting of Mr. Arthur Steuart, Mr. Edmund Wetmore, of New York, and Mr. Frank F. Reed, of Chicago; the other was of the New York Bar Association, headed by Mr. Paul Fuller, the head of the firm of Coudert Brothers, and consisting, besides him, of Mr. William G. Choate, Mr. John E. Parsons, Mr. John L. Cadwalader, Mr. Edmund Wetmore, Mr. Henry Galbraith Ward, and Mr. Arthur H. Masten. Mr. Steuart is a representative of the committee of the American Bar Association.

Mr. STEUART. Mr. Chairman, may I ask how long the committee desires to sit?

The CHAIRMAN. We will sit until 1 o'clock, at least.

Mr. STEUART. Very well.

The CHAIRMAN. How much time do you desire, Mr. Steuart?

Mr. STEUART. I think that unless the time flies faster than I think I can finish in half an hour.

The CHAIRMAN. Very well.

Mr. STEUART. But one never knows exactly how much time is going to be consumed when one begins to talk.

#### STATEMENT OF ARTHUR STEUART, ESQ., OF BALTIMORE, MD.

Mr. STEUART. It is not necessary, of course, to call the attention of these committees to the procedure which has brought forth this effort. There was a very general demand among the producers of copyrightable matter in the United States for some improvement of the copyright laws. That demand has been felt by the Librarian and others who have been interested in the subject; and it has resulted in the holding of three conferences of all those who were interested in the production of copyrightable matter, with a view of trying to learn what it was that they wanted, and what defects they thought existed in the law as it stands to-day.

The conferences were held under the admirable guidance and direction of the Librarian, and everybody who was interested in producing copyrightable matter was asked to state in his own way, in the fullest possible manner, what it was that he would like to have; what kind of protection he needed; how far the existing law falls short of giving him the protection he wants. What they said makes many volumes, and if it were all here before you I am sure you would all get tired. But it has been the effort of some of us to formulate out of that great mass of material a bill which would accomplish the desired results; and the bill which is here is the result of that effort.

It has been the work of many minds. It contains some incongruities, and I have no doubt that in many respects it is illogical. But it is an attempt to get into one bill all that copyright proprietors desired to cover. It may attempt too much. That is for the committee to say. All that those who were responsible for the drafting of the bill could do was to put into it everything that was thought desirable and leave it for the committee to sift and to weed

after hearing the criticisms which it was sure to receive from sources that were more or less adverse.

With reference to the general questions, there are a few problems which were presented to us at the very beginning. One was the constitutional provision, the necessity for living within certain narrow lines. Many of those who were interested in producing intellectual property desired a good many things to be protected. They wanted to get outside of the limitations of the copyright law and get into the field or the territory of the patent law. It was necessary, therefore, to remember at the very outset that nothing could be done and nothing could be constitutional which was not within the strict provisions of the Constitution and the language contained therein, and that no form of matter could be protected under the Constitution which was not in some sense a writing, as that word has been interpreted by the courts.

The question as to what is a writing is a very difficult problem, and a problem which this committee must consider, and which we have attempted to consider, in view of the cases which have been decided. The rights of authors, however, in their intellectual property, in the creations and products which they make, are absolute rights of property, and that is the fundamental basis upon which I desire this committee to rest its investigations.

The right of property which exists by virtue of creation in the writings of an author is a right of property which is just as absolute as any right which exists or is secured by the Constitution of the United States. Now, it is perfectly true that under the existing law a man who publishes his writing without having resorted to the statutory method of securing his title thereby dedicates his property to the public, and loses his property right. But Congress has provided a method by which he may crystallize his property for a limited period of time in accordance with the provisions of the Constitution; and when he has resorted to those statutory requirements, and has done that which the Congress has said to him he must do, his right of property in the creation of his own brain is absolute, complete, in every incident, and should be protected as such.

Congress should not under any circumstances attempt, I respectfully submit, in attempting to carry out the provisions of the Constitution to limit his right of property except so far as the limit of time is required by the Constitution. It is, of course, a deprivation of property to cut him down in his time, but that is a thing which Congress can not avoid, because they are required to limit the time. The discretion lies with Congress to decide how long the copyright shall extend.

The protection of copyright as property has always had the effect of encouraging authors, of encouraging literary people, of advancing the general literary standard of the community, and it will advance and increase the literary standard of our community.

Mr. BONYNGE. Mr. Steuart, may I interrupt you for a question in regard to the matter of time?

Mr. STEUART. Yes, sir.

Mr. BONYNGE. The language of the statute is that we "may secure for a limited period of time," etc., I believe.

Mr. STEUART. Yes, sir.



Mr. BONYNGE. What do you understand that language to mean? Could we say that that time should be 1,999 years? Would you construe that to be a limited period of time?

Mr. STEUART. Ah! That is a question quite beyond my capacity to answer.

Mr. BONYNGE. Has a court ever passed upon that matter at all?

Mr. STEUART. I do not think the courts have ever attempted to answer that question; no. I take it to be entirely discretionary with this committee. If the courts thought that what Congress did was unreasonable, was practically unlimited, they would, of course, declare it to be unconstitutional. But within certain limits almost any time is within the jurisdiction of the committee.

Mr. CAMPBELL. Mr. Steuart, is it not primarily a legislative discretion rather than a judicial one? Would it not be so even under the Constitution?

Mr. STEUART. It is certainly legislative discretion until it gets to be unconstitutional. [Laughter.]

Mr. CAMPBELL. I understand that very well. [Laughter.] But when a court comes to consider it——

Mr. STEUART. You know the story of the Irishman who said that when he got beyond the scope of interest he got into swindling. [Laughter.]

Mr. JOHNSON. We take what is given to us and are very thankful for it.

Mr. STEUART. Now, the word "writing," as the primary object for which copyright legislation may be passed, has been construed by the courts to include almost everything which the brain of man can create which is not an invention within the scope of the present law which is recorded in some form so that it can be read or seen or understood by the eye. Now, the limitation which has heretofore existed in the law has been that a writing was only that which could be read by the eye and from which thought could be conveyed from the written record to the brain of those who were reading it. Under the recent cases which have been decided in the United States courts in New York involving the duplication of music by perforated sheets the whole gist of those decisions turned upon the fact that the existing statute was such as to require that the thing written should be susceptible of being read by the eye, and that the records which were made for use in the mechanical instruments could not be read by the eye. There was much evidence of the fact that some people could read them, but the court held that the general preponderance of evidence was that they could not be read, and that because they could not be read therefore they were not writings in the sense in which the statute used that word in the copyright law, and that they could not therefore be protected.

Mr. CHANEY. They cut the blind man out.

Mr. STEUART. Yes; but that is not a necessary limitation of the use of the word "writing." The word "writing" in a broad and comprehensive sense is a record of thought. Any record of thought in a true sense is a writing, and any record of thought from which the thought may be read or from which the thought may be reproduced in such a way that it can be conveyed again from the record to the mind of another is a writing.

Mr. BONYNGE. Has there ever been any question about our right to give a copyright on the oral production of a play, for instance?

Mr. STEUART. I think none whatever; it has been recognized.

Mr. BONYNGE. Upon what is that right based? What language in the Constitution enables you to copyright and prohibit the oral reproduction of a play?

Mr. GEORGE HAVEN PUTNAM. Or a lecture? The same question would cover a lecture.

Mr. BONYNGE. Or a lecture; yes. What is the language of the Constitution which gives us the right to protect the oral reproduction of a play or a lecture by a copyright?

Mr. STEUART. The reproduction of a thing which has been printed is the reproduction of a writing. After it has been written or printed then it is a writing. If it has never been written, if it has never been printed, then the playwright goes at common law, outside of the statute entirely. It is a thing which is private property, which has been created and which has never been given to the world, which has never been published in such a way as to cause the author to lose his rights. He is outside of the statute. It is unnecessary, as long as he chooses to continue in that condition, to come within the terms of the statute, and he is protected at common law.

Mr. CHANEY. Can we extend our copyright privileges to something outside the Constitution?

Mr. STEUART. Not by statute.

Mr. BURKAN. Mr. Chairman, at this point I want to say that the court did not so hold. I have here the decision of the circuit court of appeals, and here is what they said on the subject:

We are of the opinion that the rights sought to be protected by these suits—

These perforated rolls—

belong to the same class as those covered by the specific provisions of the copyright statutes, and that the reasons which led to the passage of said statutes apply with great force to the protection of rights of copyright against such an appropriation of the fruits of an author's conception as results from the acts of defendant.

The court simply said that it was for Congress to enact laws to cover that form of reproduction, and that the present copyright laws were insufficient to cover perforated rolls.

Mr. CURRIER. That is exactly the way he stated it.

Mr. STEUART. That is precisely what I said—that the existing law was insufficient to go far enough, although the Constitution was amply sufficient to give the protection that was desired.

Now, in an attempt to get into this act some phraseology which would not be more limited than the general scope of the Constitution would permit, and yet which would be broad enough to include everything that seemed to be within the limits of the Constitution, certain words were used. Those words are "the works of an author." In section 4 it is provided "that the works for which copyright may be secured under this act shall include all the works of an author." Now, those words may be too broad. It is for this committee to say whether they are too broad. There are some works of an author that would not be writings, and it may be desirable at the outset of this bill to put into it a definition of the words "works of an author." Those words are well enough for the purposes of the act if they are

sufficiently defined. They are short; they are succinct; they travel through the frame of the bill. It would mean making a great many changes to take them out and put in other words. But they can be given a definition at the very outset of the bill which would limit them to copyrightable subject-matter within the Constitution.

Mr. WEBB. Why not use the word "writing," Mr. Steuart, and let the courts say what that word includes? That is the language of the Constitution.

A GENTLEMAN. What about it in that case, Mr. Steuart?

Mr. STEUART. Our effort was to get away from all that. We wanted to try to put into this bill something that had been settled. The courts have, during the past fifty years, included under the word "writing" a great many things which in the ordinary acceptance of that term would not be writings. Now, in order to avoid those controversies and to try to put into the bill such terms as would settle this question, we have attempted to codify here that which the courts have decided without attempting to go beyond anything which the courts have decided. We do not believe we have gone beyond anything which the courts have decided, unless we have used the words "works of an author" in too broad a sense.

Now, those words may be defined. If there is danger that the language is too broad, it might be guarded by a definition, which would be somewhat as follows:

Whenever the words "works of an author" appear in this act they shall be construed as having the same meaning as writings or forms of record in which the thought of an author may be recorded and from which it may be read or reproduced.

If that definition is incorporated into the act at the very beginning as defining the words "works of an author" there will be no difficulty about conflict with the Constitution. The courts will have no difficulty in interpreting the words "works of an author." The subject-matter which is intended to be protected will be separated and segregated from all those things which would be works of an author, but which would not be copyrightable, and would be also separated from anything which might be within the scope of the patent law.

Now I pass for a moment to the criticisms which have been made upon the various sections of the bill. I come to section 1 a.

It has been thought that this section, as the bill stands, creates rights in an author far greater than now exist and which would involve a great hardship upon the public. We think not. It has been held that under the present law the owner of a copyright has no right to do more than to print and to sell, and having sold he can not thereafter exercise any control over the particular copies, either as to the use which is to be made of them or the price at which they were to be sold. It is a well-established principle of the patent law that the owner of a patent may grant, lease, or license an invention or may sell a machine embodying it subject to any limitations he chooses to impose as to use, term, or price. The close analogy of the copyright law to the patent law has caused the framers of the present bill to believe that similar rights should exist in copyright. An attempt has been made to bring this about; but otherwise the bill does not differ from the existing law.

Mr. CHANEY. Mr. Steuart, let me ask you about section b. Would there be any objection, in order to make that plain and cover the point that has been raised against it, to adding, after the words "to sell," the words "or resell;" and then, in the second line of that subdivision, after the words "for sale," to add "or resale?"

Mr. BONYNGE. That would have just the opposite effect from what you intend.

Mr. STEUART. I think that would have the opposite effect from what you want to accomplish.

Mr. CHANEY. I understood those who are objecting to it to say that it would prohibit the reselling and the resale.

Mr. STEUART. I will mention that in a moment.

On this first point, as to the use which an author himself may make of his own printed publications, it seems eminently desirable that the property right which is granted by copyright to an author or a publisher in every copy of a copyrighted book should be such as to give to the author or the proprietor the power to deal with that book in any way he chooses. There does not seem to be any good reason why his rights of property in the copy which he himself has made, which is his own private property, should be limited. First he writes the book; then he buys the paper; then he prints the copy; then he binds it. It is his own private property, and he is ready to put it out to the public—for what purpose? Is there any good reason in the world why the owner of that book should not have a right to say to me, "I will grant you for one dollar the right to read this book, providing you will give it back to me after you have read it?"

That certainly is not a violation of any public policy. It is nothing in the world but a respect for the private property of the owner. But if I go to the owner and say to him, "I want a copy of your book," and he hands it out to me, and I pay him a dollar, what has he done? He has parted with his property without reservation in the particular thing, and it has become my absolute property. And what may I do with it? I may do anything I choose with it. I may give it away; I may sell it; I may hire it; I may burn it up.

Mr. LEGARE. That is what we want to accomplish.

Mr. BONYNGE. Yes; but does not the language of this subdivision b prevent you from doing that very thing?—because it says: that the copyright secured by this act shall include the sole and exclusive right \* \* \* to sell, let for hire, etc.

Mr. STEUART. Precisely—the sole and exclusive right to the owner of the copyright until the owner of the copyright parts with that right.

Mr. BONYNGE. But after he has sold the book to Mr. A, and Mr. A undertakes to rent it out, would he not be prohibited by this language?

Mr. STEUART. Not at all. When he has sold it without reservation he has parted with his property in it absolutely. There is no language in this act—if it is obscure the committee will be very happy to have the language made clear, but as I take it there is no language in this act—which will limit the right of a purchaser of a book or a piece of music (except for the purpose of performance, where that is

reserved) to do with the book after he buys it anything he chooses. All that this first section is intended for is that the owner of the copyright, the owner of the book, shall by this act be granted the privilege of doing with that book what he pleases as long as it remains his. The very moment he parts with it without reservation, sells it, it is gone.

Mr. LEGARE. The act says he shall have the exclusive right to sell it. Now, then, if another man sells it would he not be violating this act?

Mr. STEUART. Certainly not, if he has gotten the book from the man who had the exclusive right.

Mr. LEGARE. I do not agree with you.

Mr. STEUART. The Supreme Court of the United States, in patent cases, and particularly in an important case the name of which I can not remember at this moment, though I will think of it—a spring-bed case—has established the law beyond any question that where a patented article has once received the royalty or license fee which the owner or manufacturer under the patent is entitled to receive, that machine has then and there been freed from the obligation to the manufacturer and it has gone to the public, and the public may do with it what they please. If the owner of the patent chooses to tie a string to it before he rents it out he has a right to do that. It is his private property. He can do what he pleases with it. So it ought to be with books or with anything else subject to copyright.

If the owner gives it to the public for a price, without any reservation, then, by necessary operation of law, the public will have a right to do what they please with their property which they have purchased without reservation.

Mr. CAMPBELL. And if he gives it to an individual he has done the same thing?

Mr. STEUART. Precisely.

Mr. CAMPBELL. And if he wants to keep any hold on the article thereafter, or keep any hold whatever on it, he must either lose the sale or he must make a limited sale?

Mr. STEUART. Precisely.

Mr. CAMPBELL. He must make a lease of the thing rather than an absolute sale?

Mr. STEUART. Precisely. If the property passes it is gone, and there can not be any possible reservation. If the property has not passed, then he may reserve whatever he chooses to impose in the lease by way of conditions.

Mr. WEBB. Do you think this language in keeping with your idea, then? It says:

The copyright secured by this act shall include the sole and exclusive right  
\* \* \* to sell \* \* \* or hire any copy of such work—  
any copy.

Mr. STEUART. Yes, sir; that is perfectly clear to me.

Mr. WEBB. Well, it is not to the committee.

Mr. STEUART. If there is any question about it, we submit the matter for the committee's correction. But the thing that the act proposes to provide for is that the owner shall have this right in the first instance, and that nobody shall have it but the owner of the copyright; but that the owner of the copyright may grant it to anybody he chooses, and when he sells a copy all these rights of property necessarily go with it.

Mr. GEORGE HAVEN PUTNAM. Would it be your idea to add the words "any infringing copy of such work?" Would that meet your idea?

Mr. STEUART. It might do so.

Mr. PORTERFIELD. Mr. Chairman, I would like to suggest that the matter Mr. Steuart is discussing is a matter of contract, and not of copyright law. Of course, any man can make any condition of sale of any chattel he has under the law as it stands, and there is no need for any provision in the copyright law about it.

Mr. STEUART. Now, the law of fair use, which has been inquired about, is so well established by the decisions of the courts that I take it that it is unnecessary that anything should be incorporated in this act to make it plain that it is not intended to cut off the fair use of other people's literary matter. That is too plain, I think, for argument. If the committee thinks there is any doubt or danger about it, the word "material," before the word "part," may help it a little. I do not know that it will, but there is no objection to it. The fair use of literary matter is a well-established principle of law, and there is no possible doubt that it will be enjoyed under this act.

Section c is new in this act. It was introduced here for the purpose of permitting the protection of lectures, sermons, and addresses for profit. I do not know that there is any objection to that, but it is a new provision in the law.

Now, with reference to the clause f there are two matters. We may consider clauses f and g together. I understand that the committee proposes to consider clause g again. Therefore I shall only stop for one moment to say that from the standpoint of the committee of the American Bar Association we think g might be dropped out of the bill, but we think that just as good results, covering all of the desired remedies, that can be accomplished by clause g, that are within the scope of the copyright law, can be accomplished by adding a clause to clause f.

Clause f ends with the words "in any system of notation." It was designed by those words to cover somewhat the same ground as is covered by clause g—in fact, to cover the whole ground that was covered by clause g. Clause g came in as the result of an earnest desire on the part of some people who wanted to make it very clear that this bill was intended to stop the use of music by mechanical music-producing apparatus. Our criticism of clause g is that it attempts to encroach upon the patent law unnecessarily. We suggest that clause f be amended in this way:

To publicly perform for profit a copyrighted musical work, or any part thereof, or for the purpose of public performance for profit, or the purposes set forth in subsection b [which is to sell, or so on] hereof to make any arrangement or setting of such work or of the melody thereof, in any system of notation or form of record in which the thought of an author may be recorded, and from which it may be read or reproduced.

That will give to the composer and the music publishers everything which they could possibly get under the Constitution. That would be the copyrighting of a writing, and it would hold their compositions for every purpose for which they could be used which would result in their being produced as music to the ear or read by the eye.

So far as the introduction of the word "profit" is concerned, in the first line of that section, there has been a very great protest on the part of many people against the drastic nature of this bill, proposing to punish the public performance of copyrighted music. Now, that is the present law. The present law is just as drastic as the present bill in the prohibition of the use of copyrighted music. I have conferred with many of the music publishers, and I find that none of them have any objection to the introduction of the words "for profit." There is no reason in the world why a child or a regimental band passing down the street singing or performing a copyrighted piece of music should be penalized for the act when it is a mere matter of entertainment and a mere matter of the use of music which has been bought or learned. The thing to be protected is the business of the music publishers and not to cut off the public from the enjoyment of music which can be received or enjoyed by any mode in which it is publicly performed. So that the introduction of the words "for profit" in that clause will, I think, relieve the clause of all of the objections which have been made against it by those who think it is too drastic a restraint upon the free use and the free enjoyment of music.

Mr. JOHNSON. How would it read then—that first line?

Mr. STEUART. "To publicly perform for profit a copyrighted musical writing, or any part thereof, or for the purpose of public performance"——

Mr. JOHNSON. For profit?

Mr. STEUART. Yes.

Mr. CHANEY. The words "for profit" should be put in there, too?

Mr. STEUART. Yes; they might as well be put in at both places.

Mr. JOHNSON. Because a band going down the street and playing a piece of music is giving a public performance.

Mr. STEUART. Oh, yes; undoubtedly.

A GENTLEMAN. And the band gets paid.

Mr. JOHNSON. Its performance is a public performance for profit.

Mr. MCGAVIN. If a man plays a piano for profit, would not this restrict him?

Mr. STEUART. It would restrict him if he played it for profit.

There has been some objection made to section 3. There is a danger, quite a serious danger, which has been pointed out by some one in section No. 3, and that is in the last clause of that section, which allows all matter reproduced in a new edition which is to be copyrighted under this act to enjoy all the privileges of this act. That may be dangerous, and it may include things that were not intended to be included. The committee will, of course, give that careful consideration.

In section 5, where certain things are enumerated that are to be the subject of copyright, there are a number of subjects enumerated after the word "books" which may with propriety be called books, which in accordance with the decisions of the courts have been held to be books—composite and cyclopedic works, directories, gazetteers, and other compilations, but not including works specified in other subsections; periodicals, including newspapers—all those matters are properly books. When the bill was first drawn the committee thought the word "books" was enough; that it was unnecessary to specify any of the other subjects which would properly be desig-

nated as books, and which have been regarded and held to be books. But some of the special interests that were concerned were very anxious indeed that they should have the opportunity of submitting to the committee the form in which their particular interests would be mentioned, and for that reason the special subjects were included. It may possibly lead to ambiguity; it may possibly lead to the exclusion of some things which would otherwise be included. I really think that everything after the word "books" would properly be included under the head of the word "books," and that the other may be surplus matter.

Mr. PETTIT. Mr. Steuart, may I ask a question before you proceed very much further as to section 1, in regard to the sale which you discussed? Is it understood that clauses c, d, e, and f are reserved rights carved out of clause b? That is, where there is a sale of the article, that the rights under clauses c, d, e, and f are still reserved in the copyright owner, or does the sale under clause b purport to pass to the purchaser all the rights under clauses c, d, e, and f? Under the discussion which you were previously making, does the sale of the copyrighted thing without reservation give the same right to the purchaser that the copyright owner previously had?

Mr. STEUART. No; section c is designed to cover lectures which are to be delivered and may or may not be printed and published. The performance of a copyrighted drama is regarded as a separate estate, which is independent of the sale of the copy. The dramatization of a nondramatic work is also another separate estate, and the performance of music is a separate estate.

Mr. PETTIT. Then the purchaser, under clause b, does not take all the rights that the copyright owner had, even though there is no special limitation or notice contained in the work?

Mr. STEUART. No; not where they are reserved by the statute.

Mr. PETTIT. Well, that was a right which, I understood from your discussion, followed the analogy of patent laws—that an out-and-out purchaser of a machine such as a spring bed had the same right that the patentee had, unless there was a reservation.

Mr. STEUART. Unless there was a reservation, either an individual reservation at the time of the sale or a statutory reservation. Under the old law, as you will remember, governing extensions the man who took the license for the original term got no interest in the extension unless it was specially provided. He might buy a machine expressly for the first term, but he would not get a right in it for the second term; but that was because there was a statutory reservation.

Mr. PETTIT. I understand that, of course; but in this respect the copyright law as you interpret this provision would differ from the patent law?

Mr. STEUART. Well, no; it would not differ from the patent law. Under the existing patent law there is no statutory reservation; but as the law used to exist when there was a right of extension there was a statutory reservation, and where the extended term was granted it was not regarded as passing with an assignment of the first term. Now, there are two classes of rights which can be reserved—those which are expressly reserved and those which are reserved by statute. These are things reserved by statute.



Mr. PETTIT. So that a sale of the copyrighted thing—the book, or whatever it might be—without any express reservation on the book, implies a reservation of the rights which are here specified in this act?

Mr. STEUART. By statute—I take it so.

Mr. PETTIT. That is your understanding?

Mr. STEUART. That is my understanding.

Mr. PETTIT. I just wanted to understand that.

Mr. WALKER. Mr. Steuart, will you permit me to ask you one question on that point?

Mr. STEUART. Yes, sir.

Mr. WALKER. According to this bill as you understand it, would it be competent for an author to print under his copyright notice a reservation prohibiting people from doing anything with that book except reading it themselves? Would it be competent for the author to prohibit the sale of that book by the purchaser?

Mr. STEUART. Yes, sir.

Mr. GEORGE HAVEN PUTNAM. The right would be a different thing.

Mr. STEUART. That is another matter; but under the absolute right of the author, he could make any reservation he pleased. In other words, this so-called sale would be nothing but a license to read.

Mr. MCKINNEY. May I ask a question, Mr. Steuart? Was it the object of the draftsmen of this bill to break up the second-hand book business?

Mr. STEUART. Not at all.

A GENTLEMAN. That is impossible, sir. The purpose as expressed by Mr. Steuart is the purpose of the act.

A GENTLEMAN. Mr. Chairman, may I ask Mr. Steuart if that is not included, in his judgment, under the present word “vend” in existing law? Has not that practically the same force?

Mr. STEUART. Exactly the same force as section b of the present act, I take it—sections a and b.

Mr. HINSHAW. That is, then, you think, the words “sell, distribute, exhibit, or let for hire” are included in the present statutory word “vending?”

Mr. STEUART. Entirely. I do not think there is any extension at all of the rights granted. They are only more specifically stated.

Mr. BONYNGE. Are the reservations in paragraphs c, d, and e new statutory reservations to the copyright holder?

Mr. STEUART. No; c is, I believe, new; d is old; e is new, and f is old.

Mr. BONYNGE. So that c and d are new, and e and f are old statutory reservations?

Mr. STEUART. Yes, sir; except so far as the last clause of f is concerned.

Now, with reference to section 8: A question has been raised as to the meaning of that section in consequence of the use of a word in subsection a of section 8. As the law now stands, a foreigner may get copyright in the United States if he is a resident in the United States at the time that he makes his application for copyright and publishes his book, or if he is a citizen of a foreign nation which grants similar rights to the citizens of the United States.

It was thought, in considering this question, that there was no good reason why copyright in the United States should not be granted to a foreigner who came here and published his book first or contemporaneously with his publication in the home country, making a third class of foreigners who are entitled to receive copyright in the United States. The object to be gained is to bring the book within the reach of the American public and to have it printed here. The benefit to the United States, therefore, comes from getting the book in circulation and having the work done in this country; and it seemed to the framers of the bill that it was advantageous that a third class of foreign citizens should be given the privilege of copyright, and that foreigners who were resident abroad, but who took the trouble to come here and print first and publish here first, should have the right to procure copyright without the necessity of coming here to live.

Mr. JOHNSON. May I ask, Mr. Steuart, what the word "making" there means? Does it mean "manufacture?"

Mr. STEUART. I do not know what it means.

Mr. JOHNSON. In the ordinary sense of the word?

Mr. STEUART. I do not know what it means. How that word got in there I can not tell you.

Mr. JOHNSON. Of course the making might be the composition of the work.

Mr. STEUART. Yes; I should rather imagine it would be as well to drop the word out entirely. It does not add anything to the section. Publication is the thing we want, and publication under copyright necessarily results in the making of the book here. It has to be made here, because the type has to be set here.

Mr. JOHNSON. Mr. Chairman, may I say that our committee has formally instructed me to ask for the dropping of the words "making and" on the ground of being vague?

Mr. HINSHAW. Does not that refer to those things which might not be construed as publications, such as the perforated rolls that have been spoken of, which really are manufactures instead of writings?

Mr. STEUART. But the putting out even of a roll is the publication of it.

Mr. HINSHAW. It might be so construed.

Mr. GEORGE HAVEN PUTNAM. The word "publication" covers it—

Mr. JOHNSON. Our objection to it is that it makes an indeterminate, continuous period, instead of a definite one. "Publication" is a very definite term.

Mr. GEORGE HAVEN PUTNAM. Yes.

Mr. STEUART. Now, with reference to section 10, it has been said that the act makes no provision for penalties for a failure to comply with the requirements of section 10. It is true that in terms the act does not. In framing the act it was thought that such penalties were wholly unnecessary, for the simple reason that it is a well-understood proposition of law that copyright after publication can only exist in the United States by virtue of the statute. If publication occurs without compliance with the requirements of the statute, the book is public property, and anybody can print it or use it in any way he pleases. If, however, the owner of the copyright, the owner

of the book, the owner of the manuscript, desires to secure to himself the copyright granted by the statute, he must comply with the terms of the statute. That is the only possible way in which he can get copyright—by complying with the terms of the statute. The statute says he shall do so and so. If he desires to secure copyright he may secure it, but if he wants to get it he shall do so and so; he shall put a notice on his book; he shall print his book within the United States; he shall bring his copy within thirty days, or, if for any reason he can not do that, within twelve months. He must put his notice on all his copies.

Those are the conditions of copyright. Those are the conditions prescribed by the statute by which the estate of copyright may be created so that it will be protected by the courts.

These are express statutory provisions by which the estate is created; and the absence of a compliance with those things and all of them would necessarily be a good defense in any suit that may be brought for infringement of copyright.

Section 13 relates to the printing of books in the United States. Congress has seen fit to incorporate that clause and others in the present copyright law; and it is, therefore, a part of the present bill. It is not properly there from a legal standpoint. It has no proper place in the copyright bill. It is a tariff measure. Whatever virtue may lie in it, it is all right; I do not object to it as a tariff regulation; but it ought to be in a tariff bill, and it has no business in a copyright bill. It is there, however; it is in the present law; and I do not know that the committee has any desire or any intention to take it out. But from a legal standpoint it has no proper place, no logical place, in a copyright bill.

Mr. SULLIVAN. Mr. Chairman, I would like to ask Mr. Steuart one question, realizing his eminent legal ability, that was brought up by the arguments advanced here yesterday by Mr. Ogilvie, in which he stated that in the case of an American copyrighted book, where the type had been set within the boundaries of the United States, he could then take the type over to Canada and make plates there and have the book printed from the plates. He further stated that the Treasury had passed upon that matter, and had allowed those books importation.

I would like to ask Mr. Steuart if, in his judgment, the court would construe section 13 in this bill we are considering, where it reads, starting on line 5, "The aid of any kind of typesetting machine, or from plates made from type set within the limits of the United States"—if the court would construe that the plates, according to this language here, should be made within the limits of the United States, and if he does not believe that the court would construe from this absolute language here that the plates should be made in the United States, or that all that would be necessary would be to set the type within the boundaries of the United States and have the plates made in Canada?

Mr. CURRIER. What are you reading from, Mr. Sullivan, please?

Mr. CHANEY. He is reading from section 13 of the bill.

Mr. SULLIVAN. Section 13. I wish to ask whether the addition in the sixth line, after "made," of the four words "in the United States," so that it would read, "the aid of any kind of typesetting machine,

or from plates made in the United States from type set within the limits of the United States"—whether that would not preclude the possibility of the plates being made abroad, the book printed abroad and allowed entry here?

Mr. STEUART. Certainly; if those words were included, there could not be any doubt about the meaning of the section.

Mr. CURRIER. But it still could be printed abroad, could it not? Suppose it was amended as Mr. Sullivan suggests; then the type must be set and the plates must be made in the United States, but they could still take the plates abroad and print them abroad?

Mr. SULLIVAN. They could perform the other portion of the manufacture of the work abroad; that has been decided by the Treasury Department, and the books have been allowed to come in.

Mr. CURRIER. Mr. Sullivan, you desire, do you not, in addition to having the type set and the plates made in the United States that the books should be printed in the United States—that the presswork should be done here?

Mr. SULLIVAN. I think, Mr. Chairman, that the entire manufacture of these books should be done here; but I am only here officially designated to speak for 50,000 compositors—typographers. For some other interests I intend, with your permission, to bring up that matter in about five minutes this afternoon. That is all the time I desire.

Mr. STEUART. Now, with reference to the question of term, I think it is altogether with the committee. The question as to how long the copyright ought to cover is a question which the committee will decide after hearing everything and everybody. The present term of forty-two years is a good, long term. It is proposed to make it longer. The term in England has been made longer, and there does not seem to be any especially good reason why it should not be made longer. At the time that the English act was passed there were some proceedings before Parliament, and I would like to read for your amusement only a short letter of a few lines from Mr. Thomas Carlyle, which helped to increase the term of the English act.

Mr. BONYNGE. What is the term in England, Mr. Steuart?

Mr. STEUART. It is about life and fifty years.

Mr. GEORGE HAVEN PUTNAM. It is forty-two years from the date of publication, or for the life of the author and seven years thereafter, whichever term may prove to be the longer for that particular book.

Mr. STEUART. Mr. Carlyle, in writing to Parliament on this subject, says:

Your petitioner has written certain books, being incited thereto by certain innocent and laudable considerations; but his labors have found hitherto, in money or money's worth, small compensation or none. But he thinks that if ever it is so it will be at some distant time when he, the laborer, will probably be no longer in need of money and those dear to him will still be in need of it. Wherefore your petitioner humbly prays your honorable house to prohibit extraneous persons, entirely unconcerned in this adventure of his, to steal from him his small winnings for a space of sixty years at the shortest. After sixty years, unless your honorable house provides otherwise, they may begin to steal.

[Laughter.]

(The committee thereupon took a recess until 2 o'clock p. m.)

(The following papers are, by direction of the committee, printed as part of the record:)

**STATEMENT OF GEORGE P. TILTON, OF THE TOWLE MANUFACTURING COMPANY, OF NEWBURYPORT, MASS.**

Mr. TILTON. Mr. Chairman and gentlemen of the committee, there is a vital need of some form of protection for manufactured products of an artistic character which is not afforded by the present copyright law and which it is difficult to obtain through the Patent Office (which is now the only means of such protection), and which when thus obtained is of extremely limited duration and often absurdly inadequate in its specifications.

A patent can be secured on a design by the description of that design and a description in terms of certain correlations which, apart from the accompanying drawing, convey no idea of the aspect of the structure so described. Of course this covers the vital elements of mechanical design. It does not cover nor even approach the essentials of an artistic design, in which the indescribable qualities which appeal to the eye constitute the whole value of the work.

Now, these indefinable elements are protected in the case of certain recognized works of art by copyright. A statue, painting, photograph, or print can be copyrighted and protected for a long term absolutely to the proprietor. In this there is of course no hint of verbal description, which merely confuses the impression. The cost of such a copyright is nominal; the cost of a patent is excessive.

The trouble of securing a copyright is little, the trouble of securing a patent is much, and often it is impossible to secure a patent on something which is obviously individual in effect, because the technical structural description interferes with the technical and structural description of some other thing which is entirely and indisputably different and in no way conflicts with the thing which it is later sought to patent.

If the present patent and copyright laws were based on an intent to distinguish and discriminate between products of commercial manufacture and the work of the solitary artist with limited production, the development of methods and processes has entirely confuted this principle and frustrated the intention. A photograph, for instance, is manufactured in great quantities, a printed book is manufactured in great quantities. If we have a design to imprint on silver we must patent it if we would have any protection. In one case it is run through a printing press and is produced on paper; in the other case it is put under a drop hammer or hydraulic press and imprinted on silver.

We believe that there is a very great need of a new classification in the copyright provisions that will provide adequate long-term and moderate-priced protection to articles whose distinct character is the result of visual or artistic appreciation.

As a matter of interest in connection with the present copyright law and its workings, I take the liberty personally to call your attention to what seems to me a flagrant evasion. Many articles of silverware are now and are constantly being put on the market by reputable manufacturers stamped "copyrighted." The copyright

law prohibits, in terms, the copyrighting of such manufactured articles. The means by which this is made to seem logical to the producers is as follows: The law permits the copyrighting of photographs; it prohibits the unauthorized production in any form of a photograph so copyrighted; photographs of the article which is subsequently stamped "copyrighted" are lawfully copyrighted, which therefore secures to the owner of that article protection from imitation by others. But it seems to me that he exceeds his authority when he stamps an imitation, even though produced under his own supervision, with the word "copyrighted," because the thing manufactured is not copyrighted, and the law provides a penalty for every article which is not copyrighted and which is stamped "copyrighted."

This method, so far as my knowledge goes, was devised by a certain lawyer in New York about fifteen years ago. Soon after that time, owing to his representations, a manufacturer with whom I was connected used this, but on the strength of my representations of its dishonesty it was soon discontinued. If I am right in my deductions, there is now a premium on evasion of the present law and those who would regard that law are without any protection under it.

AMERICAN NEWSPAPER PUBLISHERS' ASSOCIATION,  
New York, December 6, 1906.

*To the Senate and House Committees on Patents:*

The American Newspaper Publishers' Association earnestly protests against all proposed changes in the law affecting the copyright of photographs, and especially it protests against amendments which in effect increase the already excessive penalties for the infringement, unintentional or willful, of photographic copyright.

This association respectfully represents that injustice is done (1) by giving to the mechanical maker of a kodak snap shot the same protection that is given to the author of a literary, artistic, or musical composition; (2) by treating the imperfect reproduction or imitation in a newspaper of a copyrighted photograph as causing every copy of the offending issue to become in the eyes of the law an infringing, damage-producing copy of such photograph, subject to penalty of not less than \$1 for every such copy and to other punishment; and (3) by failing to recognize that newspaper reprints of photographs are not such reproductions as can be substituted in sales for the originals, and that instead of inflicting injury by reducing sales they often tend to advertise and to increase the sales of the original photographs.

THEODORE W. NOYES,  
LOUIS M. DUVALL,  
JNO. STEWART BRYAN, L. D.,

*Copyright Committee of American Newspaper Publishers' Association.*

WASHINGTON, D. C., December 14, 1906.

*To the Senate and House Committees on Patents:*

Following its protest of December 6 against proposed changes in the law of copyright affecting photographs, the American Newspaper Publishers' Association urges that if any alteration of the photographic copyright law is made, the following amendment be inserted in Senate bill 6330 either at the end of section 23 (b) fourth or other appropriate place:

"*Provided, however,* That the reproduction of a photograph in any newspaper by the process known as stereotyping shall not be construed as an infringement of the copyright of such photograph."

THEODORE W. NOYES,  
LOUIS M. DUVALL,  
JNO. STEWART BRYAN,

*Copyright Committee of American Newspaper Publishers' Association.*

PUBLISHERS' ASSOCIATION OF NEW YORK CITY,  
New York, December 6, 1906.

*To the Senate and House Committees on Patents:*

The Publishers' Association of New York City respectfully protests against any changes being made in the copyright law as it stands at present in so far as such proposed changes relate to increased penalties for infringement of photographs, and respectfully requests that the copyright laws relating to photographs and their infringement, as well as penalties, remain unchanged.

PUBLISHERS' ASSOCIATION OF NEW YORK CITY,  
L. B. PALMER, *Secretary*.

FROMME BROTHERS, ATTORNEYS AND COUNSELORS AT LAW,  
New York, December 6, 1906.

HON. FRANK D. CURRIER,  
*Chairman Committee on Patents, Washington, D. C.*

DEAR SIR: As I am unable to be present at the hearing which will take place before your committee to-morrow and Saturday, I beg to call your attention to several outrageously pernicious clauses in the "Bill to amend and consolidate the acts respecting copyright," now pending before your committee.

It seems that at the conference held before this bill was submitted to Congress only the parties in whose favor the bill was drawn were invited to the conference, and that not a single person interested adversely to the legislation was invited to attend the conference, and that they were purposely kept in ignorance of what the conference was doing. It certainly was most extraordinary that the conference which advised Mr. Putnam adopted such radical legislation as is proposed in different sections of the bill without inviting any person whose business it would affect very adversely.

I represent Fred N. Innes, musical director of Innes's Band, of Chicago, Ill., and a number of musical and vocal societies throughout the United States; and while the proposed copyright bill pending before you has many objectionable features affecting the interests of my clients, as well as other interests, I will simply point out to you a few of the objectionable features of the bill affecting the interests I represent.

For instance, on the first page, in paragraph f in the first section of the proposed copyright bill now pending before your committee, you will see the word "arrangement" used. This is a very ingenious word that has been sneaked into this paragraph, and if the act is passed with this paragraph as it stands, this word "arrangement" (which means an orchestral arrangement, or the musical parts from which an orchestra would play an accompaniment to any of the various musical pieces that any of the public might wish to sing) if allowed to stand as it is, would have the effect of penalizing a vast portion of the people of the United States, and would affect the members of the church choirs of all churches and the organists, and the members of the local orchestra and military bands, both amateur and professional, musical directors and members of all vocal societies, and their musical directors, the professors and teachers of music in the public schools throughout the United States, and school children in the various schools, all public singers, vaudeville performers, serio-comic singers, stage managers of all opera companies, orchestra leaders and the orchestra playing under them for the following reason: Paragraph f in the first section of the copyright bill now before your committee gives the sole right to the publisher of any musical composition to make any orchestral arrangement, and section 25 threatens with imprisonment any of the above mentioned who should make an orchestral arrangement of any song, duet, cantata, mass, oratorio, octavo chorus, church anthems, te Deums, hymns, and in fact anything that is sung by any of the people of the United States.

For the last six hundred years it has been the custom of church choirs throughout the world to give a special service on Christmas, Easter Sunday, and other festival days throughout the year, and in order to give effect to the religious services above mentioned, the local orchestras of the towns in which the services are given have generally been employed to perform with the organ to accompany the singers in the praise of God. Now, these orchestral arrange-

ments are made by hand, they are manuscript, and are not obtainable, as a rule, from any of the music publishers, and when a choir leader desires to give one of these special services he would purchase or borrow the musical selection from some music publisher and make the orchestral arrangement himself. These orchestral arrangements up to the present time have never been considered infringements of the copyright law, and have been welcomed throughout the world for hundreds of years and enhanced the value of the property, thereby adding to the reputation of the composer, but now all this the music publishers ask to have changed, and if the publishers should succeed in having the proposed bill pass and become a law it would make it a crime for the choir leader to make an orchestral arrangement of any musical selection for his choir to use on Christmas or Easter Sunday, which has been the custom for hundreds of years, and then he would be subject to section 25 and liable to be fined and imprisoned.

We hear a great deal of what the various trusts are doing to prevent competitors from interfering with them and to obtain the money of the people, but it has remained for the music trust, who are to be benefited by this bill, to endeavor to pass a measure to penalize the people of the United States and to imprison all who, in their religious devotions, in their amusements at night, or in their occupation in daytime should dare to make an orchestration of any copyrighted musical composition.

This is the way clause f of section 1 of the proposed bill would affect the operatic profession. If the stage manager should buy a vocal score of a copyrighted opera, or his manager hand him such a score in the regular course of his business, he should interleave it and put his stage business therein for the use of his opera company he should be liable to imprisonment if the bill was passed and became a law. If a musical director should purchase a copyrighted song, or the manager of the company should purchase the same and give it to the musical director with orders to orchestrate it in the musical production, the musical director and all of the chorus singers and the principals of the company would be subjected to fine and imprisonment providing this proposed bill was passed. This would also apply to all members of vocal societies throughout the United States, if some one of their leaders should make an orchestration of any musical composition that they might purchase from any music publisher.

It is also well known that all the public schools of the United States on the last day of the school year give a little musical entertainment of, say, half an hour duration, and in order to give that they either purchase copies from music dealers, borrow them from other schools, or rent them from music libraries, and they generally procure an orchestral arrangement to be used at this entertainment. Result, all the school children, the music teachers in the school, and the orchestra taking part would be subject to fine and imprisonment at the pleasure of the publishers. This also applies to all public singers, vaudeville performers, serio-comic singers, and orchestra in all the theaters in the United States.

Then, again, in section 6 of the proposed bill. This is a very peculiarly worded section and it is very difficult to ascertain what it is intended to cover. There is a hidden menace in this section that should be clearly elucidated before it is allowed to become a law. In my opinion it would have the following effect: For instance, any publisher who took a copy of the Holy City, by Gaul (which is a cantata), and is a free work and in the public domain, should take this work and add a few bars of new music to the beginning of it, he could copyright it under this new copyright law and it would become a new copyrighted work.

I sincerely trust that you will not permit this bill to be reported until there is an opportunity afforded for the various musical societies throughout the United States to be heard on it. These societies are just about to begin the current musical year, they having been disbanded during the summer, and if an opportunity is given them to protest against the workings of this iniquitous clause there will be such a storm of protest hurled at Congress as will shake the Capitol from the pinnacle to the foundation.

I also notice in section 64 of the proposed bill that "all acts and parts of acts inconsistent herewith are hereby repealed, save and except section 4966 of the Revised Statutes, the provisions of which are hereby confirmed and continued in force, anything to the contrary in this act notwithstanding."

You will no doubt remember that this pernicious section 4966 of the Revised



Statutes was the subject of revision last spring, and that your committee favorably reported an amendment for the relief of the choir singers and vocal societies throughout the United States from the consequences of said section. This section 4966 of the Revised Statutes at the time of its passage was worded so broadly as to include the music used and sung by choirs and vocal societies, but was only intended to protect dramatic compositions and dramatic musical compositions, such as operas, musical comedies, etc., which require enormous expense to place on the stage; and in order to make the wording of section 4966 more explicit and prevent misconception I would suggest that the word "dramatic" be inserted before the word "musical," so as to read as follows: "Dramatic compositions and dramatic musical compositions."

Hoping that you will bring the facts of my communication to you before your committee, and that the word "arrangement" will be stricken out of paragraph f, first section, of the copyright bill now before your committee, and the word "arrangements" stricken out of section 6 of said bill, and that there will be inserted in section 5, paragraph e, the word "dramatic" before the word "musical," which would then read "dramatic musical compositions," and assuring you that I have every confidence in your committee and that you will not permit the failure of the Government in inviting all the interests affected by this proposed bill at the initial conferences to result in legislation prejudicial to the interests of such a large portion of the citizens of the United States, I remain,

Yours, very truly,

HERMAN FROMME.

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[From the Inland Printer, August, 1906.]

#### INJUSTICE IN PROPOSED COPYRIGHT LAW.

Mr. S. H. Horgan, art manager of the New York Tribune and editor of the department of process engraving in the Inland Printer, is making a vigorous fight against the iniquities of the proposed copyright law. In a letter to *News-papertom* Mr. Horgan says: "Proprietors of newspapers should wake up. A new copyright bill has been concocted without consulting, as far as known, a single maker of newspaper illustrations, the result being that newspapers must either give up illustrating or be prepared to pay from \$250 to \$5,000 damages for many of the pictures they will publish. The newspapers of the country had better get together in this matter, as they will be in such a shower of copyright suits as to flood them. What are they going to do about it?"

Among the various clauses in the proposed law which are prejudicial to newspaper interests and which are distinctly inequitable are the following:

Under the present law the proprietor of a photograph or negative can obtain copyright.

The proposed copyright bill (section 37) makes the copyright a distinct property from the material photograph which is the subject of copyright. Thus the proprietor of a negative or photograph may have no right to reproduce it.

Referring to the applicant for copyright, the present law says:

"He shall on or before the day of publication in this or any foreign country deposit in the mail within the limits of the United States a printed copy of the title of the photograph, and not later than the day of publication deposit in the United States mail two copies of the photograph."

The new bill (section 2) allows the photographer thirty days after publication of the work (photograph) upon which copyright is claimed to apply for copyright. And (section 15) adds: "If by reason of any error or omission he has neglected to do so within thirty days, it is permissible for him to apply for registration within a period of one year after the first publication of the photograph."

The present law orders: "The photograph must be from a negative made within the limits of the United States."

The new bill permits the photograph or negative to be made in any part of the world, and apparently by a citizen of any country.

The present law says: "The notice of copyright must be inscribed upon some visible portion of the photograph or of the substance on which the same shall be mounted in the following words: 'Entered according to act of Congress in the year —, by A. B., in the office of the Librarian of Congress at Washington,' or at his option the word 'copyright,' together with the year the copyright was

entered, and the name of the party by whom it was taken out, thus: 'Copyright, 18—, by A. B.'"

The new bill allows: "The notice of copyright shall consist of merely the word 'copyright,' or the abbreviation 'copr.,' or the letter 'C.' inclosed in a circle, accompanied in every case by the name of the proprietor or by his initials, monogram, mark, or symbol," and this can be anywhere, on the front or back or even the edge of either the photograph or the mount.

Commenting upon the proposed bill, Mr. Horgan says:

"Each one of these four sections in the new copyright bill relating to photographs has such skillfully devised changes in the present law as to give photographers largely increased opportunities for levying damages on the newspapers and all illustrated publications.

"Then the damages are defined by the new bill to include 'damages the proprietor of the photograph may have suffered,' plus 'the profits the infringer may have made,' together with \$1 for every infringing copy of the newspaper made, sold, or found in the possession of the infringer or his agents or employees.' 'Such damages shall in no case exceed the sum of \$5,000 or be less than the sum of \$250.'

"The photographer is allowed three years after an alleged infringement to begin an action, and 'in all recoveries under this act full costs shall be allowed.'"

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AFTER RECESS.

The chairman called the meeting to order.

STATEMENT OF MR. STEUART—Continued.

MR. STEUART. Mr. Chairman and members of the committee, we pass now to the nineteenth section of the act, which provides for extensions. That contains a clause which may need some explanation, and that is the incorporation of the right on the part of the licensee or assignee of the copyright to a voice in the extension. There was a great deal of discussion about the framing of that clause when the matter was under consideration by the convention, and much difficulty was experienced in trying to protect the rights of all parties, and finally this clause was reached as a compromise of the interests involved, because it gave to each side the necessity of calling upon the other, both the author or the original proprietor and the subsequent licensee or assignee, as to what should be done in the case of an extension. It was the best compromise that we thought possible under the circumstances, because it left each of those interested a voice. They had to be consulted and had to be reconciled before the application could be made. Some one has with some degree of propriety suggested that in this day, when many of our most distinguished authors are ladies, it is hardly fair to the husbands to draw an act providing for an extension for the benefit of widows only. If the act is to be logical and you gentlemen are husbands and you are going to draw an act for your own benefit, you had better provide for widowers as well as widows.

MR. HINSHAW. There is no reason why a husband should not take the property of the wife in this case any more than there is in any other property that she may possess.

MR. STEUART. Not the slightest. If the benefit is to the widow in case the husband is an author, then the extension should inure to the benefit of the widower in case the wife is the author.

Mr. BOWKER. I think the use of the word "widow" included both sexes originally.

Mr. PAGE. Is it not a fact that in Illinois the law now speaks of the interest of the husband as a dower right? I am under the impression that it does.

Mr. STEUART. I do not know. I am not familiar with the law of Illinois.

Mr. MCGAVIN. No; there is no such provision as that.

Mr. STEUART. Some objection has been made to section 22 on the ground that it creates rights which might be availed of by mere affidavit on the part of the copyright owner, and very great hardship might be imposed upon persons whose goods or books were sent through the mail or which were sent through the customs-house on the mere election, mere claim of somebody who might possibly have an interest.

Mr. BONYNGE. What section is that?

Mr. STEUART. Section 22, which provides that any reproduction, without the consent of the author or copyright proprietor, of any work or any material part of any work in which copyright is subsisting shall be illegal and is hereby prohibited. Now, it does not appear to me that there is any difficulty whatever about that. The custom-house of the United States and the post-office of the United States is not going to take the initiative of prohibiting things from passing through the post-office or through the custom-house unless they are fully assured that any action they may take is warranted by law. The proof will have to be complete before any initiative is attempted on the part of those Departments, so that I do not think there is the slightest danger to the public through the existence of those provisions.

We come now to the very important provision, section 23, which relates to remedies. This clause is one of very great difficulty. It relates to the civil remedies only. When this clause was first considered we were confronted with precedents of the patent law and the trade-mark law and the copyright law with reference to drama and music, and an attempt was made to put into this clause all of the remedies of the existing law and all of the remedies which have already been enacted by Congress with reference to patents, as well as trade-marks. A recent trade-mark law had been passed containing some very important and valuable remedies, and this clause has been drawn as a consolidation of all the remedies which had existed before with reference to copyrights, patents, and trade-marks, wherever there is no inconsistency. In case of infringement of copyright, which has been proven, an injunction, of course, goes as the usual remedy. Then, as to the question of profits and damages, the defendant is to pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all of the profits which the infringer may have made from such infringement. Now, it is said that that is a double remedy, to recover both profits and damages, something which is unknown to existing law. That clause is drawn upon the existing statutes. The patent statute contains this language, section 4921 of the Revised Statutes, after providing for the recovery of damages:

In addition to the profits to be accounted for by the defendant, the damage the complainant has sustained thereby.

Now, that is the language of the patent act. Section 19 of the trade-mark act, 1905, contains the identical language:

In addition to the profits to be accounted for by the defendant, the damage the complainant has sustained thereby.

That is the language of the patent act, section No. 4921, and of the trade-mark act. The courts have construed that language in various ways. Some of the courts have construed it to mean that the owner of the patent might have one or the other, whichever was the greater. The language seems to indicate that he may have both. On its face it appears to give both profits and damages in equity. If that is the existing law with reference to patents and trade-marks, it ought to be the law with reference to copyrights, and the attempt has been made in this act to reproduce identically the same meaning in the language which has been used. Possibly it might have been better to have used exactly the same words.

Mr. BONYNGE. Have you not made the intent of the law a little clearer by the language you have used in this act?

Mr. STEUART. If the courts will decide that the language of the patent act and the language of the trade-mark act will exclude the recovery of both profits and damages, then, for the same reason, they will decide that the language which has been used in this section will also prevent the recovery of both.

Mr. BONYNGE. Do you think that is true? Do you not use language in this section that will preclude the possibility of the court determining that they could only have one or the other of the two remedies?

Mr. STEUART. I can not see any difference in the scope of the language.

Mr. BONYNGE. You have said in this case—

To pay to the copyright proprietor such damages as the copyright proprietor may have suffered, due to the infringement, as well as all of the profits which the infringer may have made from such infringement, etc.—

that certainly means both.

Mr. STEUART. It would seem so, and this is the language of the patent act, "in addition to the profits," and "addition" does not mean either.

Mr. BONYNGE. No.

Mr. STEUART. "In addition to the profits to be accounted for by the defendant, the damage the complainant has suffered." Now, the question, as I said, is by no means one which is entirely settled by the decisions of the courts. The language of both the patent and of the trade-mark act is in itself broad enough to give both, and the language of the copyright act ought to be similarly broad.

Senator SMOOT. You were here when Mr. Wilcox, of Buffalo, made a suggestion offering a substitute to section 23, commencing on line 12, page 17?

Mr. STEUART. I was.

Senator SMOOT. You heard that?

Mr. STEUART. I did, and I will discuss that now. I have not the text of Mr. Wilcox's suggestion before me, but as I remember hearing it, it appears to me to be admirably phrased to accomplish exactly the same result which is intended by the language which is used in the bill as it is presented. The language which is here used is not altogether the best which might be chosen, but it has been

chosen for the reason that it repeats the language of the existing copyright act, and it was thought better to adhere to that language which has been construed by the Supreme Court and given a meaning which is a meaning we desire to follow in this act, than to change it even in the hope of making it clearer. The language of the section, "In lieu of actual damages and profits, such damages as to the court shall appear just," would appear to put into the court the absolute right where it was an equity case to decide what should be allowed in the way of liquidated damages, subject of course to the limitations that it must not be less than \$250 nor more than \$5,000; and that the amount which the court should determine should be decided by a computation of so much per copy according to the number of copies found. Section 4966, Revised Statutes, the dramatic act, provides:

Such damages in all cases to be assessed at such sum, not less than \$100 for the first, and \$50 for every subsequent performance, as to the court shall appear to be just.

Now, the danger in drawing a clause of this kind is that it may be construed to be penal in its character, and therefore an interpretation may be applied to it which will be exceedingly strict and rigid, and which will be objectionable for the purpose for which we desire it. We want to make it so that it will not be penal, so that it will only be liquidated damages, so that we can recover on the evidence what the court may decide to be proper, and this language, "as to the court shall appear to be just," coupled with a certain amount for each performance has been construed by the Supreme Court of the United States in the case of *Brady v. Daly* (175 U. S., 151), and it has been held that that language is not penal, that that is liquidated damages, and that that is a proper mode of expression to get liquidated damages into a statute. Now, in order to save ourselves from making any possible mistake in the matter, we have, at possible risk of being a little ambiguous, used the very words of the old statute as they have been construed by the Supreme Court, in order that we might be sure that under no subsequent construction would that language be held to be penal rather than liquidated damages. Now, Mr. Wilcox has suggested this change:

Or in lieu of such damages and profits the plaintiff may elect to claim and thereupon may recover, as liquidated damages, and not as a penalty, an amount to be assessed as hereinafter stated, but such damages shall not in any case be less than \$250 nor more than \$5,000, except that where a willful or intentional infringement is found the court may, in its discretion, double or treble the liquidated damages, even though this may raise the amount above \$5,000.

That is a perfectly clear section, which will convey exactly what we want to do. Whether it will be as safe to accomplish what we desire as the language which has been used, because of its failure to use the very language which has been construed by the courts, is a question for the committee to decide. I have no objection to the language. I think it is very good language and will certainly express what we desire.

Mr. WILCOX. If the chairman will permit, I would desire to make a few suggestions here.

The CHAIRMAN. Certainly.

Mr. WILCOX. In the friendliest spirit and a desire to arrive at a common understanding, I desire to say that the section which the gentleman relies upon as a precedent for the language used in the

bill as drafted is a section relating to damages for infringement of dramatic copyrights. Is that section equally applicable, in his judgment, to infringement of other kinds of copyrights, which are not based upon a single production and with a considerable amount of damage, like \$100 or \$50, but where the productions are numerous and the infringement in a single instance is slight and the damage in any one instance for a single reproduction may be very trifling, a few cents only, and where the conditions are quite different? Has he ever worked out in his own mind the manner in which the court would apply its discretion to a case of infringement of an ordinary cheap book where a hundred thousand copies might be produced, or several thousand copies of a lithographic print, such as I gave an illustration of this morning, where the profits were very small and the damage in case of a single infringement would be very trifling, but where the wrong is a substantial wrong, and where the present statute gives a fixed penalty of \$1 a copy? How would the court apply its discretion to such a case as that? How could it do it, unless it acted as a jury and assessed damages? Is not that likely to be confusing in the draft suggested?

Mr. STEUART. It does not seem to me there will be any difficulty about that at all. It does seem to me very desirable that in this section in which we are trying to preserve the discretion of the court, the independent judgment of the court, we are trying to give to the court the power to assess liquidated damages, which will not be penal and will not be fixed. The court ought to have absolute discretion as to how much will be allowed as liquidated damages in order that we may avoid all possible danger of creating a penal provision for the punishment of this kind of infringement. It seems to me that the words as they are used in the dramatic section, "such damages as to the court shall appear just," will certainly preserve the discretion of the court and give to the court the entire control over the whole question in a way that will avoid any possible danger of the act being construed to be penal. Whereas I think there is a possible doubt that even with the words in the section as proposed by Mr. Wilcox, that it shall not be regarded as a penalty—even with that language in the act, if the court should find, after construing it, that the act was penal, that the act did as a matter of fact provide for a penalty or as a matter of fact contain all the requirements and definitions of a penalty except in that one particular, it becomes a very serious question as to whether Congress could change a penalty into liquidated damages by merely calling it by another name.

Mr. WILCOX. If I may be permitted one other question—if the plaintiff sought his remedy on the equity side of the court and asked for an injunction and incidentally for the assessment of profits and damages, or for the substituted damages which are provided for in the second half of that section, then it would be for the court to assess the damages unless it referred that section of assessment of damages to a jury, which is what in many jurisdictions the court would do; the court would refuse to assess the damages if there were any discretion about it at all. But suppose the plaintiff did not seek his remedy in that way, suppose he proceeded directly to try to seize the infringing articles and sought his remedy on the law side of the

court, then how could the court exercise its discretion? That is what I am at a loss to find out. The case then would be tried before a court and a jury, and it would be a matter for the jury to pass upon. I do not see how the court could exercise its discretion at all.

Mr. STEUART. Of course, such questions as were submitted to the jury would have to be passed upon by the jury, and whatever verdict the jury found would leave the court in the position where the court could increase that if the court saw fit to do so, if the judgment were too small. I think it quite proper, a very good suggestion, that we should provide in the section that the court should have the power to increase the verdict of the jury. Now, with reference to the question of penalties and amount of penalties, I fully agree that they ought to be made not very large, but rather small.

Mr. O'CONNELL. May I ask a question at this point, Mr. Chairman?

The CHAIRMAN. Yes.

Mr. O'CONNELL. Is there anything in any existing sections or decisions of the court which provides that a plaintiff in an action of this kind in seeking to establish profits need only prove gross sales of the defendant?

Mr. STEUART. No.

Mr. O'CONNELL. And that the defendant must then show every item of cost?

Mr. STEUART. No.

Mr. BONYNGE. There is in the trade-mark law.

Mr. STEUART. Not in the copyright law. Yes; there is in the trade-mark law, but not in the copyright law. The language which is here with reference to the burden of proof is copied from the trade-mark law of 1905, and that was done for the reason that in the proof of profits from infringement it has been found almost impossible to recover where all the evidence had to be gotten out of the defendant and where the plaintiff was charged with the burden of proving not only all the gross sales which the defendant had made, but all the costs to which the defendant had been put. Because of the impossibility of reaching that item the committee and Congress thought wise when passing this trade-mark law to shift the burden onto the defendant.

Mr. BONYNGE. It is a very easy matter to the defendant to show the cost of making the sale in mitigation of damages.

Mr. STEUART. Yes; and in order that justice might be had and a miscarriage prevented, this provision was incorporated into the trade-mark law, and it has been repeated here.

Now, with reference to the impounding clause, you have heard it said, very properly, that that is no more harsh than the present law. It is not, and it provides also that the impounding shall be made upon such terms and conditions as the court may prescribe. That certainly is not a hardship. Impounding is not going to do any hardship to any defendant where the defendant has the careful supervision and observation of the court. The court is not going to allow the defendant to be put into any unfortunate position of oppression. If the plaintiff wants the goods of the defendant impounded, he can give such a bond as the court will consider amply sufficient to protect the defendant or submit to any other terms which the court thinks equitable under the circumstances. There is an ob-

jection which has been made to this subsection, that it leaves a great deal for the practice of the future to settle. There is doubt and difficulty as to how that is to be done. If the law is passed in this form, it is left so that it will have to be worked out in its ultimate detail as to the practice, and it is likely the practice will vary in different parts of the country. If the committee would care to go into it, I have made an elaborate scheme of practice which I should be glad to submit, but it has been left out of this bill because it was thought to be too cumbersome for the present act.

Mr. WILCOX. May I make one suggestion right there? Since I spoke this morning it has occurred to me on looking the matter over that the simplest and safest thing to do is to add a clause there directing the Supreme Court to make rules covering the practice applicable to the entire country. Those would then be similar to other rules in a great many other cases, as, for instance, the practice in bankruptcy matters, supplemented by the rules of different circuits and districts, each making rules for itself, subject, of course, to the rules of the Supreme Court. That has worked extremely well in bankruptcy cases.

Mr. STEUART. That is a very excellent suggestion.

Mr. WILCOX. I think a clause of that kind should be inserted to work out the matters contained in these two sections and the subsequent sections beginning with 32 and up to 36, and I thought that sections 23 and 24 and then sections 32 up to 36, if I am right in my numbering, instead of being separated there one from another by intervening sections on another subject, ought to be placed together, and at the end of that a distinct clause added directing the Supreme Court to make the rules.

The CHAIRMAN. Will you submit that suggestion in writing, Mr. Wilcox?

Mr. WILCOX. Yes; I will do so later.

Mr. STEUART. Yes; that is a very good suggestion. Now, let us take up section d:

To deliver up on oath for destruction all the infringing copies or devices, as well as all plates, molds, matrices, or other means for making infringing copies.

I think that clause might be improved by a slight change in phraseology. That also ought to be put within the discretion of the court, and it ought not to be left quite without, or rather, I will say it ought not to be made as positive as it is there.

Mr. CURRIER. You would change that, would you not?

Mr. STEUART. I would change that in this way:

To deliver up on oath for destruction all such infringing copies or devices, as well as all plates, molds, matrices, or other means for making such infringing copies as the court may order.

That will leave the entire question as to what is to be destroyed or delivered up to the discretion of the court, and, as one of the gentlemen said this morning, when a court of equity takes jurisdiction of a controversy of this kind it ought to be free to do complete justice to the full extent that may be necessary.

Mr. WALKER. Permit me to ask one question there, as to whether you know of any authority that the court can have or Congress can have to authorize a court to deprive persons of property, the character of which did not infringe any copyright or patent?



Mr. STEUART. This clause is designed to cover all those things which could with propriety be considered as elements contributing to infringements, and it would go no further, I am sure, when it came to be construed, than to give the court the power to enjoin and destroy all those things which were necessarily an inherent part of the infringement of copyright or which contributed to the infringement.

Senator SMOOT. You are in favor of the destruction of property?

Mr. STEUART. I think that everything which contributes to the infringement ought to be destroyed, the copies themselves, so that it could not be repeated.

Mr. GEORGE HAVEN PUTNAM. That would not necessarily include the printing press.

Mr. STEUART. Not at all.

Mr. CHANEY. The court would determine just what the elements were that contributed to the infringement.

Mr. STEUART. If the court were given that power it would decide and order just what should be destroyed and what not.

Mr. WEBB. In section 22 you provide that every reproduction without the consent of the author or copyright proprietor of any work or any material part of any work in which copyright is subsisting shall be illegal and is hereby prohibited. Now, in the beginning of section 23 you say that if any person shall infringe the copyright in any work protected under the copyright laws of the United States by doing or causing to be done, without the consent of the copyright proprietor first obtained in writing, etc., and in that section you leave out the word "author." Why do you leave out that word in one section and include it in another.

Mr. STEUART. I really don't know why the word was used in one section and not in the other. I take it the words "copyright proprietor" are all that are necessary in either section. The owner of a copyright is the only person who has a right to complain. The author may have parted with his right.

With reference to the question of jurisdiction, that is a question which of course the committee must decide. When this question of jurisdiction was before the Congress—this is in section 32—there were very many of those present who had been greatly harassed, and whose business had been greatly interfered with, by the infringement by irresponsible people, venders, people who would take a piece of music and make a thousand copies of it, or have 10,000 copies of it made in some remote place, and then take those copies out on the street and sell them, or scatter them all over the country by mail and have them sold by fakers on the street or in stores; and it was stated at that time that it would be utterly impossible to reach the infringement and stop it if the jurisdiction of the courts were limited to the place of residence or State or district of which the infringer was an inhabitant. If the suit is to be brought against the seller, against the person who has the thing in his possession, why it must be brought wherever the act of infringement is discovered. A man is found on the street selling music by the sheet at a few cents, which under the copyright would bring a dollar, and if the person who buys from this vender on the street is to be compelled to inquire the residence of that individual and then go all the way back to the State from which

that individual may claim a residence and there bring a suit, or else, as was suggested by the chairman this morning, bring the suit in the district in which the owner of the copyright may reside, his service upon this vender on the street is almost an impossibility.

The CHAIRMAN. Suppose that is changed and amended so as to provide this, "that actions arising under this act may be instituted in the district of which the defendant or his agent is an inhabitant or may be found."

Mr. STEUART. That is right.

The CHAIRMAN. Would that satisfy you?

Mr. STEUART. That is quite right.

Mr. BONYNGE. That is the language of the statutes of the different States.

Mr. STEUART. That is entirely correct.

The CHAIRMAN. It eliminates the latter part.

Mr. STEUART. That would be entirely satisfactory to us. It would give the fullest remedy.

Mr. WELLMAN. May I ask, Mr. Steuart, if that would protect the rights of dramatic composers as well as they are protected under the present law? I ask the question in the absence of Mr. Bronson Howard, my colleague, as vice-president of the American Copyright League and in the interests of the Dramatists' Club.

Mr. STEUART. I understood the chairman to suggest that the clause contained between lines 10, 11, 12, and 13 only should be amended.

The CHAIRMAN. That is right.

Mr. STEUART. Did you also refer to the erasure of any other part of the section?

The CHAIRMAN. Those are the only lines I had in mind at the time.

Mr. STEUART. That would give all of the existing language of the act (4966) which is now the dramatists' section. In section 33 it has been suggested that that section as it is now drawn would cut off the appeal to the Supreme Court of the United States. I can not so read the section; it was not so intended. If that is the interpretation which can be placed upon it it must be altered, because there is now an appeal as of right from the circuit courts of appeal in copyright cases to the Supreme Court of the United States, and it is desired to retain that right of appeal. The section is that the final orders, judgments, or decrees of any court mentioned in section 32 of this act arising under the copyright laws of the United States may be reviewed on appeal or writ of error in the manner and to the extent now provided by law for the review of cases finally determined in said courts respectively. Now, it was intended by that language to preserve the right of appeal.

Mr. BURKAN. Under the present statute, if a motion for an injunction is granted, and an order granted, we may appeal to the circuit court of appeals from that order; but the way the act reads now we would be deprived of that right to appeal, because an injunction order is not a final order; it is interlocutory. I therefore suggest that that be stricken out. It is very important to the defendant in some cases, if an injunction is granted and the defendant feels aggrieved, that he should have the right to appeal.

Mr. STEUART. That is provided for by existing act of Congress. I do not think this would change it.

Mr. BURKAN. That is the question. Might it not be contended that this statute wipes out the other act of Congress?

Mr. STEUART. It is not desirable to take interlocutory orders up. What you want to do is to take up final orders. If you leave it as it is it will only apply to final orders, and it will leave the existing statutes which now provide for an appeal in interlocutory cases stand.

Mr. BURKAN. But when this Congress enacts a law and provides that appeals on copyright cases shall be only from final orders, judgments, and decrees—

Mr. STEUART. This does not say that.

Mr. CURRIER. They are asking now for legislation allowing them to take an appeal on interlocutory orders.

Mr. BURKAN. Yes; but the act does not grant that.

Mr. STEUART. There is an act of Congress now which does grant it and which will not be affected by this clause.

Mr. BURKAN. I think it will.

Mr. STEUART. This relates only to final orders.

Mr. BURKAN. This is my construction of section 33, that the final orders, judgments, or decrees of any court mentioned in section 32 of this act arising under the copyright laws of the United States may be reviewed on appeal or writ of error in the manner and to the extent now provided by law for the review of cases finally determined in said courts, respectively, so that all copyright cases would be covered and controlled by this section.

Mr. STEUART. All final orders.

Mr. BURKAN. And would grant the right of appeal in final orders?

Mr. STEUART. Precisely.

Mr. BONYNGE. We could say that interlocutory orders may be reviewed, as provided by section so and so.

Mr. BURKAN. I might suggest "that the orders, judgments, or decrees, etc., may be reviewed on appeal or writ of error in the manner and to the extent now provided by law for the review of cases determined in such courts, respectively," simply striking out the words "final" and "finally."

Mr. BONYNGE. Would not that prevent an appeal or a review on any interlocutory order, whether an injunction order or not?

Mr. BURKAN. That is true but—

Mr. BONYNGE. You would not want to have every single order that might be made in the action reviewable by the appellate court.

Mr. BURKAN. As I understand the rule to be to-day, at least in the United States court in the New York jurisdiction, it is that any order that involves a substantial right is appealable.

Mr. BONYNGE. This would not be limited to that, but would allow an appeal from every order.

Mr. BURKAN. Why not say interlocutory order, or from the order granting or denying a motion for an injunction. It might be construed as permitting an appeal only in those cases, only from final orders. That is the danger, because you are providing for appeals.

Mr. CHANEY. It would undoubtedly be important in a case like this that in the case of an injunction you should have the right to go into the Supreme Court.

Mr. BURKAN. Yes.

Mr. WALKER. Mr. Chairman, I think Mr. Burkan is exactly right for once [laughter], and if that section is amended by canceling the word "final," in line 24, section 33, and the word "finally," in line 3, on page 28, and amended by changing "determined," in line 4, page 28, to "pending," then the operation of the section will be to relegate this subject entirely to existing law in respect to appealable orders or any one appealable order, so that when the court is asked to grant an appeal or not grant an appeal, it will be directed by this section to look at the existing law.

Mr. BURKAN. Exactly.

Mr. WALKER. Whereas if the section stands as it reads here now, it will be considered that only final judgments or decrees in copyright cases shall be appealable, and the general law heretofore existing will be considered as being modified to that extent in copyright cases.

Mr. SOUSA. Mr. Chairman, I would like to ask in that case what would happen if this bill became a law before the decision of the Supreme Court of a case that came from the circuit court of appeals? Suppose this present bill is passed by Congress, and then we will say that in a month or three months from now a case now before the Supreme Court should go there and it should be decided that under the Constitution we have rights in our compositions, can we recover for that damage which occurred before the passage of this present law?

Mr. STEUART. No; you could only recover penalties which were in the law at the time the infringement occurred.

Mr. SOUSA. Will you kindly try to reconcile this for me? In the present copyright law it says that the composer or author shall have the opportunity of printing his composition. As I understand this decision, which I have in mind, it says that the machine or music-playing device is publishing the composition by producing musical sounds. Who publishes it? The machine does not do it any more than a gun shoots itself off. The man put that record on there, and if we lose that case we lose all of that money.

Mr. STEUART. That is a question you will have to ask the courts.

Mr. SOUSA. That was in this decision published, and it so says. Now, the machine did not run around and take this up; it did not take my compositions. If I depended on the machine doing it, it would never be recorded; but these gentlemen have these machines, and I think you ought to look into that and make it so that if the court decides that "writing" means exclusive property that we will get something for a sort of back action. [Laughter.]

Mr. STEUART. Mr. Chairman, I am very much obliged to the committee for giving me the attention that it has, and I will not occupy any more time.

Mr. CURRIER. Mr. Steuart, what was the purpose of the peculiar phraseology of section 64?

Mr. STEUART. To satisfy some of the good gentlemen of the Dramatists' Club, that all the provisions of section 4966 were in the present act. That was all. We thought we had them all in; we believed we had, but they had some fear that some of them might have been left out. That was the reason.

(For memorandum of the committee on copyright and trade-mark of the association of the bar of the city of New York, prepared for the joint committee of the Senate and House in reference to the pending copyright bill (S. 6330, H. R. 19853), see Appendix, pp. 403-410.)

STATEMENT OF MR. JEREMIAH J. SULLIVAN.

Mr. SULLIVAN. Mr. Chairman and gentlemen, we have received such generous consideration from your respective committees in the past that I have refrained from taking up any more of your time at this hearing or at any of the previous hearings than possible, but I feel that in order to reply to some harsh and unjust criticisms which have been made upon our bill and also in order to introduce a slight change in the manufacturing clause of the law, that I should take at least five or six minutes of your time. I now refer to the proof copy, on page 44—

Mr. CURRIER. What section is that, Mr. Sullivan?

Mr. SULLIVAN. Section 13, the last two lines on page 44, in the proof copy. There have been some criticisms made in regard to the manufacturing clause of the law. These are the opinions of two gentlemen in regard to the manufacturing clause, and I wanted to say, in regard to those comments, with your permission—I wanted to ask if those gentlemen were aware that less than six months ago a series of American school books of the standard series now used in our public schools was imported from Japan into the port of San Francisco, invoiced at 850 per cent less than they could be put upon the American market by the American publishers, and to inquire in view of that importation whether they then used the word "canceled" as applying to the manufacturing clause or to their own business, for I am positive that with the importation of such books at 850 per cent less than they can be produced by the American publishers, that inside of five years 95 per cent of the American publishers will be also canceled.

Senator SMOOT. Well, those books were not allowed to enter the United States, were they?

Mr. SULLIVAN. They would have been allowed entry only that they carried false notice of copyright. They stole the American copyright, and the only reason they were refused entry into the United States is because they stole the copyright. Otherwise they would have been allowed entry here.

Mr. CURRIER. They took the plates over there to Japan. The plates were made here.

Mr. HINSHAW. Were they undervalued?

Mr. SULLIVAN. That could not be proven. The collector of the port held them up, in the first instance, I believe, because he thought they were undervalued, and he then found the American copyright had been stolen. The only reason they were not allowed to come in was because they carried a false notice of copyright.

Turning to page 51 of the proof copy the only other criticism I wish to refer to—

Mr. CURRIER. That is what section?

Mr. SULLIVAN. Page 51 of the proof copy, section 13, and this criticism is declared to be, or our legislation is declared to be outrageous. In reply to that I wish to say that, representing 50,000 American typographers and other interests in the printing business, we repudiate that assertion. That is a term often applied to our people for want of a better argument. I furthermore want to say that this same outrageous legislation has been submitted to the judgment of the Senate and House Committee on Patents, and that the Senators and Representatives have passed judgment upon it, and that they have reported it favorably, and that it has already passed one branch of Congress; and I am positive that if there was anything outrageous about it it would not have received your approval. I think that the marksman aimed low and shot high in that instance. That is all I wish to say in regard to the criticisms, because the other simply extends the manufacturing clause of the law.

Now, Mr. Chairman, the position that we have taken has been found necessary by our interests, and while we have been criticised, we have had some very cordial friends criticise us, believing our position was not justifiable. I have passed up for your consideration a publication of the United States Government, the bulletin of the United States Department of Labor, which on page 112 shows a printed chart carrying the average hourly rate of the American typographer, the English, the German, the French, and the Belgian typographers. Our wage rate in 1904, from statistics furnished by one of the most reliable Departments of the Government of the United States—the United States Bureau of Labor—gives it at 45 cents per hour. The average of the English, the German, the French, and the Belgian printers is found to be 11 cents per hour. Now, I have had representatives from the French and German authors, the officers of the English publishers, come to me and ask that the American typographers modify or eliminate the manufacturing clause of the law. And they have put up the cold-blooded proposition that if we eliminate the manufacturing clause of the law they will bring their books over here and have us print them. I respectfully submit to you that it is not reasonable for a moment to believe that the German, the French, or the English publisher or author will bring these publications over to the United States, where the cost of manufacture is 300 per cent more than it is at home, and have their work done here. I have told them upon all occasions that when the truth of their logic percolated through my brain I would give them my answer, and that will never be given until the tea time of everlasting sundown. As American printers we claim that the manufacturing clause of the law is the only barrier that stands between us and competition with the European typographers.

The CHAIRMAN. Do I understand, Mr. Sullivan, that you wish these sheets to be incorporated as a part of your remarks?

Mr. SULLIVAN. As a part of my argument. I request that that plate be made a part of the record.

*Wages and hours of labor in leading occupations in the United States and in Europe, 1890 to 1903—Compositors.*

Year.	Wages per hour.					Hours per week.				
	United States. (a)	Great Britain.	Germany (Nuremberg only).	France.	Belgium.	United States. (a)	Great Britain.	Germany (Nuremberg only).	France.	Belgium.
1890.....	\$0.3980	\$0.1572	\$0.1065	\$0.1207	\$0.0788	53.15	54.33	57.40	60.00	60.00
1891.....	.3997	.1651	.1048	.1207	.0756	52.62	52.67	57.78	60.00	60.00
1892.....	.4013	.1689	.1109	.1207	.0772	52.58	52.17	57.82	60.00	60.00
1893.....	.3933	.1692	.1141	.1207	.0762	53.13	52.17	57.10	60.00	60.00
1894.....	.3796	.1693	.1153	.1207	.0790	52.75	52.17	56.36	60.00	60.00
1895.....	.3827	.1689	.1238	.1207	.0794	52.73	52.17	53.41	60.00	60.00
1896.....	.3897	.1696	.1215	.1207	.0796	52.58	52.17	53.60	60.00	60.00
1897.....	.3925	.1697	.1295	.1207	.0825	52.47	52.17	51.16	60.00	60.00
1898.....	.3934	.1697	.1282	.1255	.0820	52.06	52.17	51.13	60.00	60.00
1899.....	.4086	.1699	.1294	.1255	.0825	51.26	52.17	51.47	60.00	60.00
1900.....	.4071	.1699	.1299	.1255	.0833	51.09	52.17	50.80	60.00	60.00
1901.....	.4252	.1730	.1364	.1255	.0820	50.37	51.67	50.47	60.00	60.00
1902.....	.4352	.1768	.1369	.1255	.0907	49.96	50.83	51.21	60.00	54.00
1903.....	.4467	.1795	.1411	.1303	.0955	49.81	50.00	51.08	60.00	54.00

<sup>a</sup> The wages and hours of labor shown for the United States are for compositors, newspaper, only.

I wish to say, Mr. Chairman, further, that we have followed copyright legislation and copyright matters for fifteen years very closely and have found it necessary to do so. We participated in all the conferences; we took an active part in the debates and in the discussions. It was generally understood that there would be no amendment or objection to our manufacturing clause. I wish to say that the only thing that we have offered in the entire draft of this bill is a clause or an addition to the manufacturing clause of the law which requires that with the time of the deposit of the two copies an affidavit under the seal and register of a notary public of the United States must accompany those two books, specifying that the law has been complied with and that the manufacture of those books has been done in the United States. To-day it is the simplest matter to get a copyright, and I say this with all due respect to the Librarian of Congress and to the Copyright Office, for I have great respect for both, but simply upon a printed statement made by John Doe, of Park Row, who is not known and perhaps never was seen and who can send in an application on that blank and register the copies of his work and that grants him a copyright. He does not state that he has complied with the law; he simply gives his name and address and says that he is the author of a work called "The Great West," or something of that kind. Now, we have found it necessary, following closely this law for a number of years—we do know positively from information that comes to us from reliable sources that the law is violated by the introduction into this country of old plates, metal allowed to come in here free of duty. We have therefore undertaken to strengthen the manufacturing clause, requiring that before a person secures a copyright he shall testify under oath that he has complied with the law and that those books have been manufactured in the United States.

Mr. BONYNGE. Didn't we have a bill of that kind before the House committee?

Mr. CURRIER. It passed the House. Mr. Sullivan, in view of what you state about the printing of those books in Japan from plates made in America, don't you think it is vital to the interests of the people you represent that the law should provide that the printing should also be done in the United States?

Mr. SULLIVAN. Most assuredly.

Mr. BONYNGE. That is not in this bill.

Mr. CURRIER. I would suggest that you and your conferees formulate an amendment there.

Mr. SULLIVAN. I want to suggest right here, before it gets away from me, in regard to section 13, on page 25, that on the sixth line four words be added. It now reads, "either by hand or by the aid of any kind of typesetting machines, or from plates made from types set within the limits of the United States;" and I desire to have four words added: "From plates made within the United States."

Mr. LEGARE. You want to put "within the United States" after the word "made?"

Mr. SULLIVAN. Yes.

Mr. CURRIER. That does not cover at all the point you complain of, with reference to this Japanese importation.

Mr. SULLIVAN. No; I understand that. It was drawn out here yesterday in the argument of Mr. Ogilvie. He could comply with the law in that respect.

Mr. CURRIER. I understand you take care of that, but your amendment does not take care of the further objection that in order to protect your people you need to have the book printed here. I suggest that you offer such an amendment.

Mr. SULLIVAN. Yes, we will do that; but at the same time I respectfully suggest that those four words be added in now. We believe that will minimize the danger, and where the type is set and the plates made here I can not conceive that it will be advantageous to the American publisher to then send the plates abroad and have the printing done and then pay the duty of 25 per cent ad valorem on the books so printed.

Mr. CURRIER. Oh, that could be easily done in the instance of Japan. I understood you to say that that practice, if persisted in, would put the American publisher out of business.

Mr. SULLIVAN. Yes.

Mr. CURRIER. Twenty-five per cent ad valorem on books that are manufactured for one-eighth of what they cost here is very low.

Mr. SULLIVAN. Yes. We will, therefore, thanking you for the suggestion, offer an amendment covering the entire manufacture of books, leaving the entire text as it is with that exception.

I do not wish to take up any more of the time of your committee, but I do believe, and the organization and interests which I represent believe, that you have the interest of the American workers so well at heart, and your interest in their welfare is a sufficient guarantee that this manufacturing clause of the law will be neither modified nor weakened in any manner, but that you will strengthen it in every possible way so as to forever protect us from the competition of European typographers, and with the expression of that belief I respectfully submit to you our amendment.



*Amendments proposed by International Typographical Union, International Brotherhood of Bookbinders, and International Printing Pressmen and Assistants' Union of North America.*

Section 11. Amend by inserting after the word "edition," page 7, twentieth line, the words "which have been produced in accordance with the manufacturing provisions provided for in section 13 of this act."

Section 13. Amend by inserting after the word "made," page 8, fifteenth line, the words "within the limits of the United States," and by inserting after the words "United States," page 8, eighteenth line, the words "and that the printing and binding of the said book have been performed within the limits of the United States;" also by inserting after the word "made," page 9, tenth line, the words "within the limits of the United States;" also by inserting after the words "United States," page 9, thirteenth line, the words "and that the printing and binding of the said book have also been performed within the limits of the United States;" also by inserting after the word "establishment," page 9, twenty-second line, the words "or establishments;" also by inserting after the word "process," page 9, twenty-third line, the words "or printing or binding."

Section 17. Amend by striking out after the word "published," page 13, fifteenth line, the words to and including "therefrom," in the sixteenth line, and inserting the words "in accordance with the manufacturing provisions specified in section thirteen of this act."

Section 30. Amend by striking out after the word "proprietor," page 23, sixth line, the words to and including "United States," in the ninth line, and inserting the words "which have not been produced in accordance with the manufacturing provisions specified in section thirteen of this act." Also by striking out, after the word "produced," page 24, fifth line, the words to and including "therefrom" in the seventh line, and inserting the words "in accordance with the manufacturing provisions specified in section thirteen of this act."

#### STATEMENT OF MR. GEORGE HAVEN PUTNAM.

MR. G. H. PUTNAM. Mr. Chairman and gentlemen of the committee, I would simply remind you, knowing, as I do, that the time of the committee is valuable, that the Book Publishers' Association have not yet had an opportunity to be heard in regard to the general matter of the bill. I was called upon to speak in regard to two specific propositions pending, concerning matters of which I had knowledge, but I desire to state that book publishers have in this proceeding, as in all previous copyright undertakings, had much to do with the shaping of copyright legislation, and I may say for myself that for twenty years I have had the honor of coming before the committees of the House and of the Senate in regard, first, to the copyright bill introduced in 1886; in regard later to certain amendments connected with that bill and in regard to the heading off of amendments inimical to copyright. I have labored for the strengthening, as far as might be possible, of the defense of literary and artistic property. I want here in the first place, on behalf of those interested in copyright property, and particularly on behalf of the publishers of this country, to express my very cordial appreciation of the patient and discriminating attention which the committee has given to its rather perplexing task. I have been before many committees of Congress, but I have never been before any in which we had such substantially full attendance as we have had from this committee. I have not before met Senators and Representatives who were prepared to go into the subject so thoroughly—may I say so intelligently? We realize that a very full measure of intellectual capacity is being given to the perplexing problems before the committee.

In one or two of the suggestions and questions submitted yesterday it seemed to me there was in the minds of one or two of the

legislators, and possibly of others, an idea that there ought to be and that there could be a separation in the matter of the defense of copyright between the interests of authors and the interests of the publishers. I desire to emphasize the fact that no such separation is practicable if it should be desirable, or could be desirable if it were practicable. It is said that the law is no respecter of persons. If copyright has been given to a producer, he has under that copyright a certain protection of law. The assignment of that copyright could not and should not interfere in any way with the fulfillment of the obligations under the law to the assignee, or of securing for such assignee the same full measure of protection that belongs to the original owner of the copyright. The assignee ought to be, and should be under the law, in exactly the same position as the original producer. If an architect and builder together have built a house, the buyer of that house is entitled to the same kind of protection to his property as the original producer. But if the house is to be turned over to him by the original producer with a word like this, "this is your house, but there are certain special liens behind it—liens provided for by law—that is, some people can come in and without paying rent may occupy this or that room, possibly for a library, and you, the present owner, will get no rent," in such a case the law would be a respecter of persons. That would not be equitable; it would certainly not be justice. It is no better law, it is no better justice, for a copyright than for a house, and the assignee of the copyright, on that ground of equal justice under the law, must secure all that the law originally gives to the original owner of the copyright and under the provisions which you gentlemen fix.

But apart from all that, we publishers are the business advisers and representatives of our authors. I have in my own safe some 950 copyright contracts. In those contracts I am given the responsibility of looking after the copyright interests of the authors who have retained a continued royalty interest in their property; and that is distinctly true of each publisher who publishes a copyright book. We publishers are as truly the representatives of the authors as are our old friends who are here to represent the authors' league. We represent the authors who have assigned their property interests to us, because it is our business to do so; because they are our clients, and also because our property interests are identified with theirs and can not be separated from theirs. There is the further consideration that for a large proportion of the literary property produced in this country—publications which make for the higher education of the country—the originator is the publisher himself. They are the works that the publisher has suggested; sometimes single books, such as historical works; sometimes composite works, such as encyclopedias, and always magazines. The publisher is himself the originator of such work, and whatever copyright you gentlemen decide upon under the present bill you will give to publishers as producers of literary property. On that ground also we stand before the community and before you gentlemen in exactly the same position as the author stands. There can be no separation of interests. I have been permitted during the twenty years since the organization of the Publishers' Copyright League to represent authors, just as my good friend, Mr. Johnson,

does, and particularly from year to year since the passage of the act of 1891. I have represented the authors before your committees, just as I have represented the publishers. I may say in this connection, that practically all the copyright laws of Europe were originated under the initiative of the publishers, and that is equally true for this country.

I desire to call attention also to the impression that obtains from time to time in this country that a copyright with provisions and penalties against infringement necessarily works to the detriment of the reader of books. In the countries in which there has been copyright protection, absolutely well enforced, with international copyright provisions, such as France and Germany, it is a fact that books are cheaper than anywhere in the world. The German reader gets his books at the least possible price at which they can be sold; the very best books, well written and well illustrated; and I want to emphasize that the copyright law does not stand in the way of cheap books. In fact it is only when the author and the publisher have a sure market that they can make the books cheap, and in this country he makes them as cheap as possible. We can make money by selling cheaper books, but we can not make money by selling the expensive books, as our English friends can do. That is, therefore, a further reason why you gentlemen, in giving consideration to this bill, should not think that because you are going to do justice only to the producers you are going also to further the production of literature and you are in so doing serving both producers and consumers.

In the attempt that has been made to impair the interests of authors and publishers in regard to the importation into this country of European editions of American copyrighted books I want to recall to you the essential interest of the author as well as that of his assign in having the copyright cover this market. If that author sells for a small price the right to publish his book in, say, Australia, and sells for a large price the American market for that book, it is contrary to the interests of that author that the book from the small market should invade the large market, even if he has gotten his purchase price for the book in the small market, and if he is publishing in America under royalty, the smaller price secured from the Australian copy would leave him out of pocket through the importation. There is and there can be no distinction between the owner of the copyright and the assignee of the copyright. They must act together, and of necessity so.

I should like to say just one word in regard to a detail which I think has made a little confusion in the text of the bill as here printed, and that is with reference to section b. There was a suggestion that there might be under this bill some interference with the use made by the purchaser of the book of the actual copy of the book so purchased. In this respect the phraseology of the pending bill makes no change in the actual purport of existing law—the law as it has existed in this country since 1789. There have never been difficulties in the way of any individual doing what he chooses with that copy of the book that he has purchased, as far as the actual physical substance of the book was concerned. The further suggestion made by one gentleman here to me, unofficially, that this bill might interfere with the sale of books at second hand is absolutely without foundation. I, speaking as a publisher and a bookseller, selling

books at first hand and at second hand, can say that such an idea is absurd.

The old English term "copy" is a law term. "Copy" in the legal sense means the right to the control, not of the sheets, not of the paper and of the binding, but of the substance, the essence, of the book. The law that you are now considering undertakes to protect *copy* in the legal sense of the term. It is the essence of the author's work. You do not undertake in this copyright law, and in no copyright law will you undertake, to say anything whatsoever about limiting in any way the use to be made of the printed sheet or bound volume. That is an article. Unfortunately for our English language the word "copy" covering this physical thing and the word "copy" in the legal sense, covering the thought, is the same word, but there is no more actual relation between the two than between the spring of the year and the spring of a watch. I think your minds should be freed from any such thought. We publishers would be the last men to suggest anything that would hamper the resale of books we had once disposed of, because if we did, the booksellers would not buy our books. I think we can be trusted to protect our undertakings in that matter by any provision to which we assent, both for the interests of the authors and for our own.

Our friend "Mark Twain" made yesterday a joking suggestion—and our friend Mark Twain must always be permitted his little joke—that at the expiration of the copyright term the publishers would go on "rolling in their profits," while the poor authors would sacrifice any further returns.

Mr. Clemens very well understands, of course, that the publishers have themselves always worked for a longer term, the longest term in this country and in any country that could be secured. That does not look as though they were conspiring in "a grab game" of copyright. I have myself worked persistently for authors' rights, as did my father before me. We have always striven to see the fullest justice for literary producers. I may say further that any publisher would rather control a market than go into a scramble, and that was one ground why the publishers initiated in 1841 and in 1886 the work for an international copyright; and have labored persistently since for its maintenance and extension. We would rather control a market, and we can do better for the public with a controlled market than with a scramble market. I may say that on my own catalogue nearly half of the publications are books which have been planned by the publishers. We can produce books, gentlemen, only if you will give us a sure title and control to that which we produce, control at home, and as far as under international arrangement may prove practicable, recognition abroad. Anything that weakens the property title interferes with production, interferes with higher education and with the interests, therefore, of the consumers—interests that you gentlemen ought to represent and very properly do represent. All we want is a sure title for what we have produced. We are not asking for protection in the tariff sense of the law. We get some of that in the bill now, and individually I do not want it. We are asking for protection in the legal sense of the term, and therefore we are not coming before you asking for a privilege; we are only coming for justice, justice for the authors and justice for ourselves.

I am prepared to confirm the understanding of my friend Mr.

Sullivan in regard to what has been assented to in the original protection provisions of this law, the manufacturing clause of 1891, which we have not undertaken to disturb, and in regard also to the rather drastic addition to that manufacturing clause, the addition, namely, of a certificate that we have done our duty under the law. I wish to say frankly that the publishers protested against that. We do not understand why, after obeying the law like other people, we should also have to swear to that fact that we do obey the law and to pay money for certificates. But we have accepted it. We accepted it in conference with Mr. Sullivan, and we have nothing further at this time to say about it. We accepted it as we have accepted a great many other things that we do not approve and that we do not find just.

Our main interest is for the security for the authors and for their children and grandchildren, and for their right to the furthest and fullest returns from their labor. As the business representatives of the authors, we ask for a law that shall further the development of literature and the higher education of this country. We publishers are, it is true, also working for gain. I suppose all active citizens are workers for gain, but we are working for gain in an honorable profession which has to tackle not a few difficult problems. We get our living as best we can by trying to serve the authors and the reading community. You have already given us your thoughtful and courteous attention and we are now depending upon your services and power as legislators to assure us a copyright law which will be for the benefit of this generation and for generations to come.

Mr. WEBB. One moment, Mr. Putnam, before you leave. I desire to ask one thing about making contracts between publishers and authors. Suppose an author in this country sells to you his book at the royalty of 50 cents on each book, and that book is also published in Australia or some foreign country. What would be the difference in the royalty the author would receive, generally speaking, between what you give here and what he would get for his Australian copyright?

Mr. G. H. PUTNAM. You are naming a fixed price instead of referring to the form that the royalty usually takes, of a percentage: but taking it on a dollar-and-a-half book we will say that the royalties range from 15 to 25 cents a copy. We will say that his book has been published for railroad sale in Australia, to be sold for, perhaps, a shilling. He would not be likely to sell the right to Australia on a royalty basis at all. The country is too far off and it would be too difficult to get settlements. He will let the Australian publisher put that book into a railroad edition, say, for the round payment of £10. He is getting, say, \$200 per thousand copies which are sold here. But he has sold his copyright in Australia for £10, and every Australian copy that comes in here and is sold takes away property from him just as much as it takes it away from his American publisher. His book is being sold here on a royalty basis, and if the Australian copy takes the place of the copy that I may publish then, of course, as I say, his property is being taken away from him just as much as my property is being taken away from me. Look at it in this way. The author gets a copyright and sells that copyright to me for a big market for \$5,000, and will sell that copyright in a

small market for some such small price as I have named. We now come back to the old principle of law that law is no respecter of persons. I have paid for property under the law. Now, if the edition from the small market comes in and is sold here, that is taking away my property. It might be done under the law. It has been done under the law of 1891. I explained yesterday the interpolations that were made in that law without consultation. That was appropriation. It was legalized appropriation; legalized robbery, if you will. That is what it amounted to. I paid for my property and then under the law, if it has been heedlessly framed, my property is taken away from me.

Mr. HORACE PETTIT. I would like to ask a question there. Does that same argument which has been used for the Australian edition apply to the English edition. No one wants a shilling railway-edition book in a public library.

Mr. G. H. PUTNAM. The importation of a book is sometimes desired, not because it is cheaper, but because on one ground or another it is different, and for one purpose or another it may be better. The English edition may contain more illustrations, though that is not frequent under present conditions. Our American people demand the best and get the best. We point out that just before 1891, if a library or an individual in this country wanted an English edition of an American work, there was no difficulty of his getting it from the ordinary trade representatives, through the ordinary channels of trade. Under the law as we have framed it, the libraries can still import one copy of that English edition, and if they do that twice a week they can get 104 copies a year, and I suggest that in so far as that is concerned we have gone as far as we ought to go.

Mr. THOMAS NELSON PAGE. Mr. Chairman, may I call attention to one thing at this time? It is well known, no doubt, to many of you that in England the control of the great many classes of books, particularly fiction, that are issued in England vests in what is called the Mudie libraries. They are simply public libraries having subscribers, and, as I understand it, they really control the price of books, the issue of books largely, in the beginning. For instance, when *Trilby*, which we all remember with a great deal of pleasure, was sold by Du Maurier to Harper & Brothers years ago, Harper & Brothers published an edition of *Trilby* which went all over the country, with the drawings by Du Maurier himself, and that book was published, I suppose, for \$1.50 in this country, certainly for not more than \$2. *Trilby* was published in England as a guinea volume by the Mudie Libraries—I mean they controlled it—a guinea volume, without the illustrations. I think that some years afterwards they did publish a cheaper edition, with illustrations, but I am not positive about that, and if this clause about libraries should be retained—and I am not prepared to give what weight my views may have absolutely against it—I think that at least it ought to be carefully guarded, so that the libraries which are included in the clause shall not be libraries that are established simply for private purposes. These are beginning now all over the country. We have various libraries now, circulating libraries all over the country, and possibly, under this clause, those libraries may very seriously interfere with the publishers' business, as Mr. Putnam has very justly said, and

with the authors themselves, whose interests are really absolutely defended by the first-class publishers of this country.

Mr. G. H. PUTNAM. Just one word more, Mr. Chairman, in regard to a manufacturing detail. We have accepted the manufacturing provisions of the bill, and those manufacturing provisions include a restriction as to the manufacturing in this country of the plates, of illustrations, and what not, lithographs, etc. We have arranged with the interests represented in several conferences that in the cases of designs, where the objects to be produced did not exist on this side of the Atlantic, permission should be given to produce on the other side of the Atlantic the original lithographic photogravures or photographic plates, as might be the case. If that permission were not granted no copyright could be secured for books coming into the country presenting views of the great buildings abroad, or of the great works of art, or possibly of scenery, such as Mount Blanc. In the case of lithographs, for instance, the color scheme has to be worked out in the immediate view of the object to be taken. If the narrower views which were talked over in some of our conferences should prevail and should again be emphasized by your committee, then the exception specified should be permitted, unless you are going to throw out a great deal of important art work, in the cases where the object to be reproduced does not exist on this side of the Atlantic. In these cases the photographic negatives and the lithographic designs must be produced on the other side and must be permitted to be used in copyrighted books produced on this side.

*The Pending Copyright Bill.*

MEMORANDA BY GEORGE HAVEN PUTNAM.

[Section IX, page 4.]

Under this section it is provided that the notice of entry of United States copyright required under the American copyright law is to be affixed to all copies of the work "published or offered for sale in the United States." This simply makes a more specific wording of the purport of the existing law, as this law has been interpreted by the courts during the past century. -

The suggestion has been submitted to your committees that this requirement for notice should be held as binding, not only for copies published or offered for sale in the United States, but for copies produced or offered for sale anywhere throughout the world.

Against this suggestion it is contended that any attempt on the part of the Congress of the United States to enforce provisions of American law upon parties who are not citizens or residents of the United States must, of necessity, prove a futility. Apart from the question of the wisdom of attempting such legislation it may be said most definitely, from the point of view of business experience, that it would prove impracticable to secure the fulfillment of any such obligation on the part of publishers or of printers throughout the world.

The copyright of hundreds or thousands of American publications would be forfeited through the inadvertence or the ill will of some stray printer in Melbourne or the Cape Colony.

The suggestion for the change in our bill comes from a person who has himself recently attempted to bring into publication in this country an edition of the revised Webster, the reprint of which he undertook with the full knowledge that the book was covered by American copyright. His pretext for so doing was that the edition, as printed in London, did not contain the notice of such copyright. Those who favor this specification are parties who are opposed to copyright, or who are desirous of securing facilities for its infringement.

[Section XIII, page 5.]

The provision under which a book securing American copyright must be printed from type set within the United States or from plates made from such type is in line with the manufacturing provision of the existing law. This provision should not be modified in such manner that the requirement should in any way be widened.

A suggestion was submitted before your committee that the book securing protection under the American law should in its entire contents or material be produced within the United States. Such a requirement would involve the necessity for the entire production in the United States not only of the type and of the printed sheets of the book, but of the illustrations.

Under the existing law, copyright can be secured in the United States for illustrations produced under one of the higher art processes, the production of which has been carried on abroad. The ground for this provision is that illustrations, and particularly illustrations produced by any processes to be described as "art processes," must be produced in the places in which the originals exist. For photogravures, the negatives must be made in the place in which the original is located.

For lithographs and color reproductions generally, the color scheme must be worked up by a designer working in view of the object to be reproduced.

In case the requirement should be enforced that the entire work must be completed within the United States, it would be impracticable to secure for American readers in any books with copyrighted text the advantage of artistic illustrations reproduced from the originals of any objects which did not exist on this side of the Atlantic. As, for instance, for scenery Mount Blanc; for business, St. Paul or St. Peters; for works of art, Raphael's "Sistine Madonna," or Murillo's "Immaculate Conception."

Such a change would be a step backward from the present law and would constitute a material obstacle in the way of the literary and art activities and the higher education of the country.

The present bill provides that the work shall be done in this country, "excepting where the object or originals to be reproduced can not be secured in this country."

With this provision the representatives of the trades having to do with art reproductions expressed themselves in the copyright conferences as satisfied.

[Section XXX, page 16.]

Under this section the importation into this country of copies produced abroad of works which have secured American copyright is prohibited. This is the natural and logical application of the principle of copyright under which the producer of the article secures the exclusive control of its sales. To this prohibition certain exceptions are made under paragraph (e).

Under those exceptions (see clauses 3 and 4) libraries, whether incorporated or unincorporated, are left at liberty to import, irrespective of the permission of the owner of the copyright, not to exceed one copy of a book in any one invoice in an edition of such book that has been produced abroad.

If this provision becomes law, every library, school, academy, etc., throughout the country has the privilege of importing in successive invoices, say to the extent of two per week, copies which for any one book could aggregate as many as 104 per year.

Such an authorization appeared to present every possible facility to the institutions, libraries, etc., large or small, which on one ground or another found it desirable to utilize European editions of American books, and the managers of which did not want to incur the labor of securing the permission of the owners of the copyright of such books. The provision thus drafted, while in itself constituting a most exceptional exception to copyright law, an exception that does not obtain either in the copyright law of Great Britain or in that of any one of the continental states, was assented to by the authors and the publishers who have a direct business interest in controlling the sales in the United States of copyrighted books for the purpose of meeting the views of the librarians.

It was assented to in the copyright conferences, after discussions that extended through a period of twelve months, by the official representatives of



the American Library Association, and it was understood that their acceptance constituted a final adjustment of the issue.

A certain number of the librarians of the country, declining to be bound by the action of their authorized representatives, have submitted to your committee contentions for the retention of the provision in the existing law.

The section in the law as it now stands was inserted without debate, discussion, or consideration during the last day of the session in which the law was enacted.

It was so loosely worded that in addition to giving the libraries and institutions full permission for the importation of copyrighted books, it extends the same permission to individuals. It does not even place any restriction upon the edition so imported, leaving anybody in the United States free to import from abroad, in competition with the so-called American editions, copies which had been produced in foreign editions without any arrangement with the author.

As a result of this provision, the importation of foreign editions of copyrighted books has steadily increased, and the so-called protection of copyright for the authors and their representatives has become a farce.

The provision as it stands represents a law, but not justice. The suggestion has further been made to your committee that in some fashion or other the new law should recognize the interests of authors in regard to copyrighted editions, but should minimize the claims of the assigns of the authors, the publishers, in regard to the control of such editions. Such a distinction would not be equitable if it were practicable, and it is in any case not practicable. The thing that is protected by the copyright law is not the person, but the copyright. The law must be no respecter of persons. The property in the copyright is entitled to precisely the same consideration whether it be in the hands of the original producer or has been (for consideration) assigned by such producer to a business representative or to any other party. This is essential, not only as a matter of justice to the assignee, but for the property interest of the producer.

If the producer is not in a position to secure for the assign under such assignment the property control in the copyright assigned, the returns coming to the producer, the author, in consideration of his copyright must of necessity be seriously lessened.

If an author has accepted a small price for his copyright for some small market, such as that of Australia, for instance, there is a direct business loss to him on each copy of the Australian edition which in coming into sale in this country would prevent the sale of a copy of the authorized American edition.

The acceptance of £20 from Leipzig or of £10 from Melbourne in full consideration of an assignment which was intended to be local would constitute but an unsatisfactory consideration if copies of these local editions were to prevent the sale of the American edition, which ought to produce for the author of a \$1.50 book from \$150 to \$250 per thousand copies sold.

Further, if a publisher has purchased from an author for a fixed sum his American copyright, he has the right as the assign to secure the full property value of this. He has paid a large price for a large market.

If this market is interfered with by the invasion of copies of an edition coming from a small market for which a small price has been paid, the property of such publisher has been taken away from him. This is the case under the present law, the effect of which constitutes a legalized appropriation. The clause in the bill as drafted gives, as stated, the fullest possible facilities for importation. The door for the entry of supplies of copyrighted books ought assuredly not to be made any wider than is the case in the existing provision.

The provision of the existing law has the result of furthering by special enactment the business of the foreign author at the expense of that of the American publisher, and also, as explained, to the injury of the American author.

The owners of American copyrights are not asking for any special privileges, but simply for the recognition of their property rights in their copyright.

Mr. WILCOX. Mr. Chairman, may I now present to the committee the draft of the amendment which they asked me to prepare, and which I find is one that is very simply prepared, fortunately, owing to the explicit language of the bankruptcy act? This is a proposed amendment as to sections 23 and 24, relating to remedies and espe-

cially damages, and to sections 32 to 36, inclusive, relating to remedies and procedure. I think these sections should be brought together in the bill by moving sections 25 to 31 to another place, and I think also that there should be added a new section or some such provision as follows, which I have copied from the bankruptcy act, section 30:

All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed and may be amended from time to time by the Supreme Court of the United States.

I think that will save the committee very much time and worryment over details.

#### STATEMENT OF REGINALD DE KOVEN.

The LIBRARIAN. Mr. Chairman, Mr. De Koven is not able to be present, and he has asked Mr. Berry to present his statement.

Mr. BERRY. Mr. Chairman, Mr. De Koven had hoped to address this committee this afternoon in support of section g, but he is ill and not able to attend. He requested me to represent him. I therefore present his statement. I should like further to refer to the statement which has been made by some people that the composers in this country were not in favor of section g. As far as Mr. De Koven is concerned, he desires to state most emphatically that he is not only in favor of it, but hopes with all his heart that it will be adopted. I will now file Mr. De Koven's statement:

Mr. DE KOVEN. Mr. Chairman and gentlemen, having the honor to appear before you to-day, I beg to call your attention to section g of this bill, which reads as follows:

To make, sell, distribute, or let for hire any device, contrivance, or appliance especially adapted in any manner whatsoever to reproduce to the ear the whole or any material part of any work published and copyrighted after this act shall have gone into effect, or by means of any such device or appliance publicly to reproduce to the ear the whole or any material part of such work.

This clause, as you doubtless are aware, was inserted in the bill to give a long-needed protection to composers, who for years have suffered from the depredations of a number of mercantile companies and corporations like the Æolian Company, the Victor talking machine, the Edison phonograph, and others too numerous to mention, who have taken—I had almost said stolen—their copyright works without so much as saying “by your leave,” and grown rich on the sale of them. Of late, with the most stupendous impertinence and unblushing effrontery, they not only have not paid for the single copy of such works necessary to make their reproductions, but have actually demanded a free copy from the publishers in order that they may plunder the more easily and at the least possible expense. Their right to do this is that of the aboriginal man with a club—the same right that I should possess to knock down a man, were I strong enough to do so, and forcibly take possession of his watch and chain. But here the law intervenes to protect him, and the object of this bill is for the law to intervene to protect the unfortunate composer.

If I may be allowed to say so, gentlemen of this committee, it seems to me that the whole question of this bill and of this clause, which is the particular bone of contention, has been lost sight of in a mass of pettifogging chicanery, specious subtleties, and legal quibbles, invented and fostered by those whose special interest it is that this

bill should not pass. But I take it, gentlemen, that the real principle and basis of the matter in hand is the difference between right and wrong, the difference between honesty and dishonesty, the difference between national honor and national dishonor! Why should the United States, now the first of the great nations of the world, be the only one not to pass a decently honest copyright bill? Why should the United States, which has made itself foremost in the world for inventions of every kind by the liberality and justice of its patent laws, discriminate against its composers by a refusal to pass a copyright law properly protecting them? The more particularly so, as I understand, that the passage of such a law has been recommended to Congress by the United States circuit court of appeals in the southern district of New York. What may or may not be done in Germany or Turkestan, in Switzerland or Arabia, in regard to the status of those universal pilferers, the mechanical-instrument makers, does not, I conceive, enter into this argument at all, as the United States in its power and majesty is amply able to decide for itself what is just and equitable, honest and right, without reference to what other nations may or may not do under similar conditions.

I take it, gentlemen, in the first place that the proposed bill of Mr. Currier is a good bill. My own opinion in the matter is amply indorsed by all my eminent confreres in the profession, like Victor Herbert, John Philip Sousa, Prof. Horatio Parker—to name but two or three of the many who are deeply, nay vitally interested in the passage of this measure.

I am advised by eminent counsel that it is entirely competent for the United States in Congress assembled to pass such a bill, a point which, I believe, has been raised in opposition to it. Into legal technicalities of this kind I do not propose to enter. But from an ethical standpoint it would seem to me to be simply futile that the Congress of the United States should have full power to protect one class of citizens and be powerless to protect another. Further, there can be no question as to the necessity of the bill, at least so far as the protection of the composers of the United States is concerned, for the present law does not protect them in the way that they have every right as United States citizens to demand that they should be protected.

Without trespassing too far upon the time of this committee, I should like to call attention to a few of the points that have been raised as arguments against the passage of this measure by those who desire to prevent its becoming law. As a homely illustration in equity, let us suppose that some agricultural implement should be invented that would double the output of his land for any farmer. Would it be fair that the inventor of that implement should take to himself the whole of that added increment without any benefit to the farmer himself? I think not, gentlemen. But that is exactly what the Victor talking machine and the other corporations of that ilk are doing to the American composer to-day. Again, I would ask, for what reason does an intending purchaser go, let us say, to the Victor talking machine and purchase one of their rolls? Is it for the purpose of admiring the roll as a work of art or framing it to hang on a wall? No, gentlemen, it is to hear the music—mark the word, to hear it—and the music is heard, that music which is the property of the composer, which emanates from his brain, is heard just as much

on the Victor talking machine or the Æolian pianola or on any other mechanical instrument as it is if played on an ordinary piano from sheet music bought from a reputable publisher. The purpose of music, the whole purpose, is to be heard.

Again, I am told that the composer should be grateful to these predatory gentlemen for advertising his works, for bringing them to the notice of the general public. The manager of the Æolian company told me on one occasion that the previous year they had sold about \$125,000 worth of my compositions. My regular royalties on this amount would have been nearly \$20,000. I think, gentlemen, you will admit that this is a pretty large item for advertising in the budget of any composer who writes for a living.

Again, I am informed that these Edison phonographic records, the Victor talking-machine records, and the various and sundry records on perforated paper sold by these various companies are not my writings under the meaning of the law. If they are not, who, then, wrote "Robin Hood" when issued in the perforated paper roll or "The Serenade" when given out in a Victor talking-machine disk? I think that any man of sense will allow that any author has the right to choose his own medium for the record of his thoughts, and should I and other American composers elect to write only on perforated paper rolls will anybody here inform me whether the United States would refuse us a copyright? And then where would the mechanical instruments be?

Again, I am informed that in bringing music to the attention of many people who have not known it before that these mechanical devices are of benefit to the general cause of music. This may or may not be so. I personally very much doubt whether any mechanical device ever aided the cause of true art. But even were it so, there is no reason why the many should be benefited at the sole expense of the few least able to bear it.

Furthermore than this, I can not suppose, gentlemen, that even were this bill to be favorably reported and passed that these various firms, whose business capital aggregates many millions, would go out of business. It only means that their profits would be a little less; that they would be able to build fewer million-dollar stores on Fifth avenue, in London, in Paris, and elsewhere. All that we ask is that we should be paid by them for the use of our music, which represents the output of our brains, the same royalties that our ordinary publishers pay us.

And this brings me to another point. The whole principle at the basis of the interstate-commerce law, the whole rationale of the suits now being brought by the United States against certain great corporations, is unfair discrimination between various classes of citizens in carrying on their legitimate business. I ask you, gentlemen, is it not the most unfair discrimination that one class of merchants, the publishers, should be obliged to pay the composer for the use of his brain while another class be allowed to use his brains without payment? Why should one pay if not the other? Why, indeed, should the composer be paid at all, poor fellow? Let him follow art for art's sake and starve in some garret like another Chatterton.

If I may be allowed to remark, gentlemen, it seems to me, as one who has given the subject some study, that the whole matter is so absolutely simple and straightforward that there is no argument to

be made about it; that no intelligent legislator having the best interests of his constituents and the country at large at heart could do anything but recommend this bill for passage without further comment or discussion.

I saw by the papers recently that a large corporation had been formed, principally backed by one or two of the big mechanical instrument makers, with a large capital, for the purpose of defeating this measure. I ask you, gentlemen, for what purpose is it necessary to raise large sums of money to defeat a measure before Congress? What is to be done with these large sums of money when raised? But we composers have made no corporation, we have made no subscriptions of large sums of money—we simply come over here at our own expense, having the honor to address this committee with confidence in the justice of our cause, with confidence in the ability of the gentlemen before whom that cause will be pleaded, with confidence that as American citizens we have the right to appeal to the United States of America for protection against what I consider the grossest injustice, the greatest wrong that has ever before in the world's history been perpetrated in any country against any one class of citizens. And if, in view of the fact of these large sums raised by these wealthy corporations to defeat this bill, I ask you, gentlemen, with all due respect, with what dignity, with what sense of self-respect you can again greet your constituents and say, "We have reported this bill unfavorably; we have cast our vote on the side of injustice against justice, of wrong against right, of public dishonor against public honor," for I repeat, gentlemen, this is no question of individual interests, either of the Music Publishers' League or the Instrument Makers' Association, or even of the poor oppressed composer—it is one, rather, of national polity, of national honor, and as such you must all agree, gentlemen, as intelligent legislators, that this measure must be reported favorably and must be passed.

I thank you, gentlemen, for your attention.

THE LIBRARIAN. I understand that it is the preference of those who oppose these provisions, which perhaps it might be well to refer to as paragraph g, that the proponents of them should be heard first. I understand that Mr. Burkan will represent the proponents of the bill at the outset in discussing the questions of constitutionality which were raised by Judge Walker last June.

MR. PETTIT. Mr. Chairman, may I say a word before the clause is discussed in regard to another suggestion? I notice this in looking over it, that it seems that clause g might very probably interfere with the act regarding the grant of patents. The section says that the copyright secured by this act shall include the sole and exclusive right (g) to make, sell, distribute, or let for hire any device, contrivance, or appliance especially adapted in any manner whatsoever to reproduce to the ear the whole or any material part of any work published and copyrighted after this act shall have gone into effect, etc. It is quite probable that appliances of that kind may be patented later, that this might be so construed as meaning to take precedence hereafter of any invention which might be specified in that clause, as it says that the copyright secured by this act shall include the sole and exclusive right to make, sell, and distribute, etc.

THE LIBRARIAN. I might remark that any communication I receive from Mr. Fuller he remarks upon that possible interpretation, and

makes the statement that it is not the machine that infringes any more than it is the printing press, and that the language, being susceptible of a wrong interpretation, should be modified.

Mr. PETTIT. Yes; and I was going to make the suggestion of an amendment along those lines, and was also going to suggest, in view of certain opposition that was presented here before at the June meeting regarding the laws as to compulsory licenses, as it seemed to be the impression among many or a number that this clause might preclude many of the manufacturers practically from manufacturing anything that was copyrighted. My suggestion of an amendment on those two points would be simply in these lines, if I may just read briefly this rather crude suggestion of an amendment, to add to clause g, at the end thereof, the following:

*Provided*, That nothing herein contained in clause g shall interfere with or supersede any rights under the patent laws: *And provided further*, That the owner or proprietors of the copyright as to the subjects included in this clause g shall grant license to any manufacturer upon the written request of any such manufacturer to make, sell, use, distribute, or let for hire any of the said devices, contrivances, or appliances upon tender of payment of a reasonable royalty for the same.

That is merely a very crude suggestion on the line of compulsory license.

Mr. BOWKER. I wish to say that on behalf of the American Copyright League I shall ask leave later in discussion, after the opponents have presented their case, to say some words in behalf of the general rights of authors. I shall ask leave also to submit as part of the record a statement, and perhaps some specific suggestions. I wish to call attention now to the suggestion made this morning by Mr. Steuart, that the substance of clause g would be served and be much simpler by adding to clause f some very simple words, which would cover the whole ground much more effectively, and I hope in the discussion of clause g that the substitute by attachment of the clause to clause f, suggested by Mr. Steuart, may also be considered.

Mr. SOUSA. Mr. Chairman, before the discussion proceeds I wish to call attention that I found this morning in Washington a composition of mine which was copyrighted in 1872, "Moonlight on the Potomac." That is thirty-five years ago. I was a little bit of a fellow, and I am not now a decrepit old man. I have children who are in their teens, and I think that the limit of the copyright might very justly be extended. That may possibly yet be of some benefit to my children.

#### STATEMENT OF MR. NATHAN BURKAN.

Mr. BURKAN. Mr. Chairman and gentlemen, I am the attorney for and represent the Music Publishers' Association. I represent also in a friendly capacity Mr. Victor Herbert, Mr. John Philip Sousa, and also the Baton Club, an organization consisting of musical directors and composers.

The CHAIRMAN. How much time do you wish?

Mr. BURKAN. From half to three quarters of an hour. I wish to devote most of my time to the constitutional question whether a perforated roll is a "writing" within the meaning of the con-

stitution. I have also prepared briefs for the use of the members of this committee.

In reference to the phraseology of section 1, subdivision g, which has been criticised because it may be construed to interfere with patent rights, section g, when we had the conferences which resulted in this bill, we desired to have it modified so as to cover perforated rolls and phonographic cylinders, and counsel suggested that something in the form of subdivision g be adopted. I am willing to have it changed so as to have it read that the right of a copyright owner shall extend to the use of his composition for reproduction upon any mechanical device, and I shall submit an amendment to that effect during the day or on Monday.

The CHAIRMAN. I would suggest that so far as it now appears to me, it would be more important to argue this question as a matter of principle rather than as something relating to the form of an amendment.

Mr. BURKAN. That is what I intend to do.

The CHAIRMAN. Whether, first, it is permissible under the Constitution, whether under clause g those devices are copyrightable, and upon the merits of the case, rather than the form of amendment which you desire and which the opponents object to.

Mr. BURKAN. That is what I propose to do. Now, the power of this committee to report to the House and Senate this bill embodying subdivision g is challenged, because it is claimed that a perforated roll or phonographic cylinder is not a "writing" within the meaning of the Constitution. In order to discuss this question properly, we must go back to the time of the framing of the Constitution. It was decided by the Supreme Court of the United States that the Constitution must be interpreted in the light of the common law and in the light of the knowledge that the framers of the Constitution had of the law of copyright, the principles and history of which they understood and which were familiarly known to them. We find that in 1769, prior to the adoption of the Constitution, the great case of *Miller v. Taylor* was decided. That case attracted wide and great attention in this country as well as in England. The question arose as to what the rights of an author were in his literary productions. The claim had been made that a writer had no common-law rights in his intellectual creations, that the moment he published a book or a composition or manuscript it became public property, and that case established the principle that an author had a common-law right of property in his intellectual creations, no matter what form that creation may take. I will cite to you on that proposition, and you will find it on page 22 of my brief. The court in deciding that case said:

The printing of it (the book) is a mere mechanical act, and the method only of publishing and promulgating the contents of the book. The composition therefore is the substance. The paper, ink, type, only the incidents or vehicle.

The value proves it. And though the defendant may say, "Those materials are mine," yet they can not give him a right to the substance, which (on whose paper or parchment soever it is impressed), must ever be invariably the same. Nay, his mixing, if I may so call it, his such like materials with the author's property does not render the author's property less distinguishable than it was before; for, the identical work or composition will still appear, beyond a possibility of mistake.

Now, when we examine the Constitution in the light of the common law and in the light of the common understanding of the framers of the Constitution of the nature of copyright, and they were well acquainted with this decision, we must reach the irresistible conclusion that the word "writings" in the Constitution does not mean the script of an author, but the intellectual production of the author. Mr. Madison, one of the framers of the Constitution, wrote in the *Federalist* an extensive article upon this very clause of the Constitution, and he uses throughout the article the words "literary productions, intellectual productions," and he does not say that by "writings" they intended the script of the author. It is remarkable to note that the Supreme Court of the United States in discussing the *Samson* case, on which our adversaries rely so much, says:

Nor is it to be supposed that the framers of the Constitution did not understand the nature of copyright and the objects to which it was commonly applied, for copyright, as the exclusive right of a man to the production of his own genius or intellect, existed in England at that time, and the contest in the English courts, finally decided by a very close vote in the House of Lords, whether the statute of 8 Anne, chapter 19, which authorized copyright for a limited time, was a restraint to that extent on the common law or not, was then recent. It had attracted much attention, as the judgment of the King's Bench, delivered by Lord Mansfield, holding it was not such a restraint, in *Miller v. Taylor* (4 Burrows, 2303), decided in 1769, was overruled on appeal in the House of Lords in 1774 (*ibid.*, 2408). In this and other cases the whole question of the exclusive right to literary and intellectual productions had been freely discussed.

We entertain no doubt that the Constitution is broad enough to cover an act authorizing copyright of photographs, so far as they are representatives of original intellectual conceptions of the author.

Now, if that was the understanding of these men who framed the Constitution, that what was protected by copyright was an intellectual production, then we are bound in interpreting this clause of the Constitution to interpret it in the light that those men understood it when they used the word "writings." You will find that the clause to which I refer is section 8 of Article I of the Constitution, which provides:

The Congress shall have the power to promote the progress of science and useful arts by securing, for limited times, to authors and inventors the exclusive right to their respective writings and discoveries.

This word "writings" is used solely with reference to the production of the author—the work or composition. This language was not so used in this clause as to indicate that that writing can be protected against another writing only, or that the author's rights are restricted to reproducing his writings in writing only. The intent was to protect his writings—that is, the subject of the writings, the intellectual conception embodied in that writing—and whatever form that writing may take, as long as that writing is reduced to some tangible form, as long as the idea, the intellectual production of the author is capable of being identified, capable of being distinguished, then he has a right of property, entitled to protection under that clause of the Constitution. Take the perforated roll. I contend that that is just as much a writing as is a composition written in Sanscrit. If I should take a composition and have it written in Sanscrit and deliver it to you gentlemen for consideration, I venture to say that very few would be able to understand it, to distinguish, or to



identify it. But the moment you get a translator, get one who understands the language, to translate the same in English, then every idea embodied therein becomes visible, and that applies to a perforated roll and to these other mechanical devices.

Mr. LEGARE. Can anyone read a perforated roll?

Mr. BURKAN. No; but the moment you take the perforated roll, which embodies an intellectual production representing a given musical composition, operate it in connection with the mechanism to which it is adapted, and it reproduces but that composition. When that roll was made the manufacturer bought a sheet of music, we will say Mr. John Philip Sousa's "Stars and Stripes." The man who manufactures that roll follows strictly that composition. Every perforation corresponds to a note in the "Stars and Stripes" in sheet music notation. That perforated roll represents but one thing, namely, that musical composition, the "Stars and Stripes," and nothing else. When you take that roll and place it upon the machine to which it is adapted and operate the machine it reproduces the "Stars and Stripes" and nothing else, because it was made to embody that composition and nothing else. During the process of reproduction the ideas embodied in the roll become visible, capable of being identified and recognized by the ear.

Senator SMOOT. You mean it is a reproduction of that writing?

Mr. BURKAN. Yes. The Constitution says you may protect the author's writings. The literal construction of "writings" means script, and in the Sarony case the court says:

The construction placed upon the Constitution by the first act of 1790 and the act of 1802 by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century it is almost conclusive.

What did those men do in the act of 1790? They covered charts, maps, and books. A printed book is not a writing, if you are going to apply the literal construction, because a literal interpretation of "writing" is script; and then subsequently Congress went on and protected statuary, engravings, photographs, and all the other subjects enumerated in section 4952, and what did the court say about that?

So, also, no one would now claim that the word "writing" in this clause of the Constitution, though the only word used as to subjects in regard to which authors are to be secured, is limited to the actual script of the author, and excludes books and all other printed matter. By writings in that clause is meant the literary productions of these authors, and Congress very properly has declared these to include all forms of writing, printing, engraving, etching, etc., by which the ideas in the mind of the author are given visible expression.

So clearly the intention was not to protect the script alone, but to protect the intellectual production. It makes no difference what form it is in, whether it be in Chinese, whether it be in the form of a drama, whether it be in the form of raised letters for the blind. It is still a literary production, an intellectual production. That is what the framers intended to protect, and when we interpret that clause we must interpret it in the light of that understanding and intention. To ascertain what these men understood by writings, it may be profitable and useful to refer to the copyright laws they had enacted before they framed the Constitution. In 1783 the Colonial

Congress adopted a resolution recommending to the several States that laws be passed by the different States of the Confederacy to protect writers in their intellectual productions. Twelve of the thirteen original States passed copyright laws, and in most of these acts the object and policy of this legislation is set out by way of preamble. We find there the following declarations of principle and policy:

The improvement of knowledge, the progress of civilization, the advancement of human happiness, and the public weal of the community greatly depend on the efforts of ingenious persons in various arts and sciences. (New Hampshire, Rhode Island, Massachusetts, Georgia, New York, North Carolina, New Jersey, Connecticut.)

The principal encouragement such persons can have to make great and beneficial exertions of such nature must consist in the legal security of the fruits of their study and industry to themselves. (New Hampshire, Rhode Island, Massachusetts, North Carolina, Pennsylvania, Georgia, New York, Connecticut.)

The principles of natural equity and justice require that every author shall be secured in receiving the profits that may arise from the sale of his works. (Georgia, New York, Connecticut, New Jersey.)

Such security (of the fruits of their study and industry to ingenious persons) is one of the natural rights of all men, there being no property more peculiarly a man's own than that which is produced by the labor of his mind. (Massachusetts, New Hampshire, Rhode Island, North Carolina.)

These men who had framed these different laws did so between 1783 and 1786, a period of from one to four years prior to the time of the adoption of the Constitution. When they met at this constitutional convention it is not reasonable to suppose that they would be willing to abrogate any of the rights that had been guaranteed to their citizens at the time when this instrument was drawn. They were jealous of the rights of the different States, and when this Constitution was framed their idea was to protect and secure to authors the same rights they had had at common law and the rights they had in the States in which they resided.

So, to embrace all the rights of an author in the concisest language possible—they were not framing a code, this was to be a constitution—they used the concisest language possible; they used the word "writings," by which they intended to cover every form of intellectual creation. And it is in the light of that knowledge and understanding, it is in the light of what these different States declared for, that we must interpret the word "writings" in the Constitution, and the United States Supreme Court in the *Sarony* case, when it interpreted the word "writings" with reference to a photograph, said that we must interpret it in the light of what the framers understood copyright should protect, in the light of what they intended to do when they framed this instrument. Now, what did they intend to do? In their different States they said it was the policy of the law to protect men who create. They said the fruits of intellectual labor is property entitled to protection, and they used the word "works" in describing intellectual effort. Can we now at this late day say that the framers intended to protect mere script? The moment you extend writings to printed matter, the moment you say that a piece of statuary is a piece of writing it will be straining language to the utmost possible extent, yet Congress has protected statuary and no one has ever questioned its power. But the opponents to the bill say the author's right is limited to reproducing his writings in writing, and Mr. Bonyng put his finger upon the point that must defeat all attempts to convince you gentlemen that you

have not the power to enact this legislation. He asked someone under what authority does Congress protect dramas against dramatic representations. Under the copyright acts of 1856 and 1897 Congress protected dramatic and musical compositions against performance and representation. These acts extended the author's right beyond reproducing in writing and the protection beyond that against infringement in writing.

When a drama is produced on a stage, you do not see a reproduction of a writing upon a screen. You see and hear the ideas of the author reproduced by means of dialogue and action. Take the case of a pantomime. The ideas of the author are reproduced by means of gesticulations. There is no word spoken. That is a dramatic composition, and what is the purpose of the drama? The main purpose is to produce it. Many dramas have no value for literary purposes. The entire value lies in the representation of them. The principal profits that the dramatist derives is from the public production of that drama. What was the object of the framers in inserting the copyright clause in the Constitution? Their object was to promote progress and science. They sought to encourage literary men to write, to create, so that the general public might be benefited. They knew that to stimulate a man to write or produce it was necessary to give him exclusive rights in his property, and in the different cases I shall cite you will find that the only test the Supreme Court has applied in determining whether an intellectual creation was a writing was whether it tended to promote the progress of science and the useful arts.

In the *Sarony* case the Supreme Court overrules the contention that a writing is script, or that the right of an author is limited to a reproduction of his intellectual productions by a writing. Our opponents contend that because a perforated roll or phonograph record can not be read it is not a "writing," and rely upon a sentence in the *Sarony* case which reads:

By writings in that clause they meant the literary productions of those authors, and Congress very properly has declared these to include all forms of writing, printing, engraving, etching, etc., by which the ideas in the mind of the author are given visible expression.

They contend, therefore, that a perforated roll is not a writing because it can not be read and the idea embodied therein is not visible. The Supreme Court did not say that. The Supreme Court said that a writing meant the literary productions of the authors. The Supreme Court declared statuary, engravings, prints, and charts within the list of subjects to which Congress has properly given protection at different periods of time. The court uses the word "includes." The court did not intend to exclude anything when it used the word "includes." Take a work produced in Sanscrit; it is visible, but the ideas are not visible. You do not understand them, and the court did not say that the object must be visible. The court said that the ideas must be visible. When you take a perforated roll which is sold as music, in which the music of the composition is strictly followed, each perforation representing a note, the value of each perforation corresponding to the value of the note, that is a writing, because the moment that is placed upon the machine to which it is adapted and started in operation it reproduces an intellectual

production. The moment you hear that reproduced, it becomes capable of being identified.

Mr. LEGARE. To take your illustration of the perforated roll, one man can perforate a roll, another man make the machine, and a third man put the machine to work, and then the machine reproduces the music. Now, who reproduces the music, the man who made the roll, the man who made the machine, or the man who made the machine go?

Mr. BURKAN. The roll.

Mr. LEGARE. But you say you can not read it.

Mr. BURKAN. You can identify it.

Mr. LEGARE. Then, it is absolutely worthless until you put it on the machine. Can not the inventor make himself read the roll?

Mr. BURKAN. Yes; but the moment that roll is placed in the machine—

Mr. LEGARE. But some other person puts it there.

Mr. BURKAN. He is the reproducer, the man who makes the roll, because that work embodies the intellectual production. If they take Mr. Victor Herbert's Pan Americana, that roll will represent nothing else but just that composition.

Mr. LEGARE. But it is absolutely worthless unless some one else puts it in the machine.

Mr. BURKAN. A drama is absolutely worthless unless it is put on the stage. Take the score of an opera; the orchestral score is written for performance by different musical instruments. The score in itself is unintelligible, but the moment the musicians perform it that moment it becomes intelligible, and I claim that a perforated roll is more distinguishable—

Senator SMOOT. The machinist could read it before you. Do you claim that you can take a perforated roll and read it?

Mr. BURKAN. I do not. I do not base my argument upon that. There is nothing in the law or in the Constitution that requires a thing to be read to be entitled to copyright protection. The only test is, Does it embody an intellectual production? What does the roll represent?

Mr. HINSHAW. I suppose a phonographic disk could not be read?

Mr. BURKAN. I admit that, but that phonograph disk is made in this manner: They take a wax cylinder, to which is attached a horn. A man takes a given musical composition, we will say, the "Stars and Stripes," and he plays it into that horn, and the sounds coming from the instrument impress themselves on the disk by means of indentation and lines, and that disk, when used in connection with the instrument, reproduces but one musical composition, and that disk embodies an intellectual production.

Mr. WEBB. It is the air, is it not?

Mr. BURKAN. It is the sound.

Mr. WEBB. But one sound may be played on a steam piano and another on a violin. It is the air, is it not?

Mr. BURKAN. Yes. Music is addressed to the sense of hearing; it appeals to the ear. When a piece of music is performed it appeals to your ear. It is the sound, the melody, the sound or combination of sounds, the succession of collated sounds, a succession of harmonies, that constitute a musical composition. Now, take the case

which was decided the other day by Judge Buffington—Edison Company v. Lubin. It appeared that 4,500 pictures were taken in rapid succession of the launching of the yacht *Meteor*. These pictures were reproduced on a positive celluloid sheet and were entitled "A Photograph Christening of the Launching of Kaiser Wilhelm's Yacht *Meteor*," and duly copyrighted. It appeared that this celluloid sheet could not be read, could not be distinguished by the eye. The purpose of it was to reproduce it upon a screen by means of a magic lantern and to give to its reproduction the appearance of a moving picture. That was the only purpose of the celluloid sheet. And the court held that although this celluloid sheet could not be distinguished and was not visible to the eye, the moment it was used in connection with the magic lantern to which it was adapted each one of the pictures became distinguishable and visible upon reproduction thereof, and was therefore a "photograph," entitled to protection under the copyright act.

Mr. BONYNGE. Then it became a reproduction of an intellectual idea, the same as the performance of a drama is the reproduction of an intellectual idea, the same as a perforated roll when it is put into a machine becomes a reproduction of an intellectual idea.

Mr. BURKAN. Yes; precisely.

Mr. CHANEY. It has a visible expression when it is reproduced.

Mr. BURKAN. Yes; it becomes intelligible to the mind.

A Gentleman. Suppose you take a blank sheet of paper and you use some invisible ink, you have to use some acid or some light in order to reproduce it.

Mr. BURKAN. Yes. It would be entitled to copyright, provided it represented an intellectual conception.

A Gentleman. That it is visible to the eye has nothing to do with it.

Mr. BURKAN. No.

Mr. BONYNGE. It is visible to the intellect. That is the point.

Mr. BURKAN. Now, as the court said in *Millar v. Taylor*, it is the intellectual production that is entitled to protection, and not the means or the vehicle for indicating to the senses the ideas embodied therein, the ideas of the author. The purpose of printing is to indicate to your senses the ideas embodied in the paper; so in the case of perforated rolls or phonographic disks it is but another method of conveying to the mind the ideas of the author embodied therein. ~~2~~

Mr. HINSHAW. It may be the sense of touch or hearing or sight.

Mr. BURKAN. For the blind they have raised characters. The blind man does not see anything, but the moment he touches those raised characters they convey an idea to his mind, the ideas of the author. In the *Sarony* case the court said that a photograph is entitled to be protected, not because it is visible or invisible, but because the photograph is representative of an intellectual conception, because the operator exercised his ingenuity. The court said the operator had arranged the draperies, had created the pose, and the photograph embodied the operator's intellectual conception. ~~5~~

Mr. BONYNGE. Would you contend, in reference to the use of the word "visible" in the opinion, that what the court intended was that the idea should be conveyed to the minds of men regardless of what sense of man conveyed that idea to his intellect?

Mr. BURKAN. Precisely so. That is our contention, and the Supreme Court sustains our contention. The court says this photograph is entitled to protection because the operator created something. This photograph is a representation of an intellectual conception, and in the case of an ordinary snap shot, where the man creates no pose, where he exercises no ingenuity, it says in such a case a copyright may be no protection, and it uses the following language:

The third finding of facts says, in regard to the photograph in question, that it is a useful, new, harmonious, characteristic, and graceful picture, and that the plaintiff made the same entirely from his own original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by plaintiff, he produced the picture in suit. The findings, we think, show this photograph to be an original work of art, the product of plaintiff's intellectual invention, of which plaintiff is the author, and of a class of inventions for which the Constitution intended that Congress should secure to him the exclusive right to use, publish, and sell.

So this case was not decided upon the theory that it was visible or invisible, but upon the theory that the plaintiff who had taken this picture had exercised his ingenuity; that he had created something. This kind of writings came up in the trade-mark cases, and the Supreme Court said in that case that although a trade-mark is visible, yet it was not entitled to protection because it was not the embodiment of an intellectual production—an intellectual creation. It must be an intellectual creation to be protected by copyright. The court says that the writings to be protected are the fruits of intellectual labor embodied in the form of books, prints, and engravings and the like. The Supreme Court says it is visible and as such not entitled to protection, because it is not an intellectual conception.

Mr. BONYNGE. That is the case in which the court held that we could not protect trade-marks under that section of the Constitution, but if we protected them at all it must be under the interstate-commerce clause.

Mr. BURKAN. Yes. So you see in all these cases the criterion is, "Does the production in question tend to promote science and the useful arts?" and that is the only test, not whether it is visible or invisible, not whether it can be read.

Mr. BONYNGE. You mean visible in the ordinary signification of that word?

Mr. BURKAN. Yes; they use the word "visible" in the sense that it must be capable of being identified or understood by one of the senses, by the sense of touch, hearing, or seeing.

The CHAIRMAN. By the appropriate sense.

Mr. BURKAN. That is the idea. In *Holmes v. Hurst* (174 U. S., 82-89) the rule is laid down by the court as follows:

It is the intellectual production of the author which the copyright protects and not the particular form which such production ultimately takes.

So you will see that the courts in passing upon this question of what is writing within the Constitution always decided upon the principle that the subject-matter which Congress has power to pro-

fect is the embodiment of an intellectual production. Let us see what the understanding of copyright was at common law. Blackstone says in his commentaries:

The identity of a literary composition consists entirely in the sentiment and the language; the same conceptions, clothed in the same words, must necessarily be the same composition; and whatever method is taken of exhibiting that composition to the ear or the eye of another by recital, by writing, or by printing, in any number of copies, or at any period of time, it is always the identical work of the author which is so exhibited.

That was the understanding of common law. That was the understanding when the Constitution was framed. That was the understanding of the men who framed that Constitution, and it is in the light of that understanding that you gentlemen must interpret this clause in enacting this legislation.

Mr. HINSHAW. Is there any other device to which this section g is intended to apply except the perforated rolls and photographic disks?

Mr. BURKAN. Those are the only ones known to us to-day.

Mr. HINSHAW. That language may cover some new inventions.

Mr. BURKAN. That is the purpose.

Mr. JOHNSON. There is a new invention on the market. There are two. One has been heard of in the magazines, called the dynamophone, and there is still another, the telegraphophone, which has an important bearing on this question, on which I will speak to-morrow or Monday, if so desired.

Mr. BURKAN. This perforated roll or cylinder is sold as music. It is listed in catalogues as music. Its value is dependent upon the name of the author who composed the piece that it reproduces, the reputation of the author and the merit of the composition which it is adapted to reproduce and not upon the material of which it is made. It sells as Victor Herbert's or as John Philip Sousa's composition. That is its value, and the man who buys it buys it because he knows it embodies the intellectual creation of a good author. The value of that roll is not dependent upon the materials used in the manufacture of it. The man does not care about that at all. What he wants is a roll that embodies the tunes of John Philip Susa's Stars and Stripes, or any other composition.

Mr. HINSHAW. In other words, the perforated roll stands to the original production from the man or author in about the same relation as the printing press stands to the idea.

Mr. BURKAN. That is right.

Mr. BONYNGE. As the printed book stands to his original manuscript.

Mr. BURKAN. To the original idea.

Mr. BONYNGE. Yes.

Mr. BURKAN. The purpose of the sheet or roll is to convey to the mind of the man the ideas of the author. You take a man who has no knowledge of the art of music; who can not read sheet music. A sheet of music is unintelligible to him, but that same untutored mind, the moment a disk is used in connection with the proper machine and reproduces the melody embodied therein, will recognize it.

Mr. WEBB. Is that the idea, the melody or the air? Is there any idea in melody or air unless you name it?

Mr. BURKAN. Yes.

Mr. WEBB. Is there any idea when you hear a bird sing? Is there an idea expressed through that song of the bird?

Mr. BURKAN. Yes.

Mr. WEBB. Unless you know the name of the bird, and you associate the word song, usually, with the mocking bird.

Mr. BURKAN. Yes; but it would be a creation if sung by a human being. Those notes have musical value. They represent something. Many beautiful compositions have been written on those two or three notes which a bird will give forth. Those two or three notes may give inspiration to a composer, who may write upon them as a basis a beautiful song.

In the case of the National Telephone News Company v. The Western Union Electric Company (119 Fed. Rep., p. 297) the court says:

Nothing, it would seem, evincing in its makeup that there has been underneath it, in some substantial way, the mind of a creator or originator, is now excluded from copyright protection.

This shows that for a work to be entitled to copyright protection does not depend upon being visible or invisible, but whether it represents an intellectual creation, whether the man who created it exercised his ingenuity, whether that man created something. The conclusive answer to this objection that is raised here, that you have not power to enact this legislation, was given more than fifty years ago in the act of 1856, whereby Congress protected dramatists against a public representation of their dramas, because then you enacted a principle of copyright that when a man copyrights a dramatic composition his rights are not limited to reproduction in writing only, but extend to any representation of that composition, and since 1856 that has been the law. The Supreme Court passed upon it in the case of *Daly v. Palmer*. The question was not raised directly, but the court permitted the plaintiff to recover several thousand dollars damages for an unauthorized representation of a drama, and the court naturally would not have allowed the plaintiff to recover unless it believed that Congress had the power to enact that legislation.

Mr. BONYNGE. Has that question ever directly arisen?

Mr. BURKAN. Not on the constitutionality. It has not been raised, but for more than fifty years the power of the Congress to give this protection has been recognized. It has become an established principle of law, and I say it is too late in the day for Congress to say that it had not the right to grant that protection, when the courts have not assailed that right, and when the people have recognized that right. It is a serious thing to say to this Congress that it had not such right, and I never yet heard of any legislature surrendering any right that it believed it had, especially when the courts have recognized that right and the people have respected that right.

Mr. BONYNGE. Especially when it has been exercised and concurred in.

Mr. BURKAN. Yes; and for over fifty years. It is too late in the day for Judge Walker to come to you and say: "Gentlemen, the act of 1856 is unconstitutional." I am very well convinced, and I believe you gentlemen will not surrender that right at this late day.

In conclusion I desire to call the attention of the committee to a decision of Justice Marshall in the *McCulloch* case, wherein he says that the Constitution was intended to endure for ages and to be



adapted to the various human crises. He says the Constitution must be adapted to the changing circumstances of our national life, and that that instrument, written so many years ago, was intended to endure for generations to come; and if now a question is presented whether you can protect an author in his creations by prohibiting an infringement or a reproduction of his property by a method unknown when the Constitution was framed, under that ruling of Justice Marshall you have a perfect right to enact such legislation. §

I herewith also submit my brief on this question, which is as follows:

*To the Senate and House Committee on Patents.*

ARGUMENTS IN SUPPORT OF COPYRIGHT EXTENSION TO DEVICES ADAPTED TO REPRODUCE MUSICAL WORKS.

Section 1, subdivision (g) changed at our request to read, "To make, sell, distribute, or let for hire any device, contrivance, or appliance adapted in any manner whatsoever when used in connection with any mechanism to reproduce to the ear or to cause the said mechanism to reproduce to the ear the sounds forming or identifying the whole or any material part of any work copyrighted after this act shall have gone into effect, or by means of any such device, contrivance, appliance, or mechanism publicly to reproduce to the ear the whole or any material part of such work," extends the copyright to phonographic devices, such as perforated rolls, cylinders, disks, and records, used in mechanical processes of reproduction. This form of reproducing literary works has become important only within recent years, but its use has now assumed such proportions that the object of our copyright policy, *i. e.*, to secure to the intellectual worker the full fruits of his labor, will largely fail unless he is protected against the unauthorized appropriation of his work by means of these mechanical devices.

The power of Congress to enact this legislation has been challenged on the ground that these phonographic records, disks, cylinders, or perforated rolls, though they contain some form of record of an intellectual product, are not "writings" within the clause of the Constitution authorizing copyright legislation.

The clause in question is section 8 of Article I of the Constitution, which provides that—

"The Congress shall have the power to promote the progress of science and useful arts by securing, for limited times, to authors and inventors the exclusive right to their respective writings and discoveries."

The word "writing" is used here solely with reference to the author's product; to indicate the thing which may be the subject of copyright. The word "writing" is not so used as to indicate that the writing shall be protected only against other writings or that the author's rights in his writing shall be limited to the right to reproduce it by other writings.

As to the extent of the author's rights the Constitution uses the most comprehensive term possible, "the exclusive right;" that is, all rights.

As to the extent of the protection authorized the language is equally comprehensive, "securing;" that is, effectually guarding and insuring.

This cursory glance at the language of the Constitution would seem to show that the objection based on the word "writing" can not properly apply to section 1, subdivision g. For that subdivision does not propose to make phonographic devices a subject-matter of copyright; it does not define the subject-matter of copyright at all. The subject-matter of the copyright is the work; in our case the musical composition. This subdivision simply deals with a form of reproduction of the subject-matter of copyright, or, in other words, a form of reproduction of the "writing" indicated in the Constitution.

The subdivision states one set of rights that shall be secured to the author in his work: Its constitutionality does not depend upon the question whether phonographic devices are writings, but whether the securing to the author of the right to make and sell these devices for reproducing his writings is covered by the words "secure" and "exclusive rights" that are employed in the constitutional clause in question.

The words "exclusive right" are broad enough to include every profitable use that can be made of the author's work.

The word "secure" is broad enough to include any form of protection that may be found necessary to make effectual the exclusive right.

It would do violence to these broad expressions to uphold the contention that the author's rights must be limited to the right to make duplicate writings, and his protection can not go beyond forbidding the infringement of his rights by means of other writings.

In the interpretation of this clause of the Constitution the United States Supreme Court has considered the construction placed upon it by the members of Congress in the acts of 1790 and 1802, because those men were contemporaneous with the formation of the Constitution, and many of them were members of the convention that framed it. (*Lithographic Co. v. Sarony*, 111 U. S., p. 53.) In like manner we may derive some light as to the meaning of the language used in this clause from the copyright acts passed by the State legislatures shortly before the adoption of the Constitution.

These acts were the result of a resolution of the Colonial Congress, adopted in May, 1783, recommending to the several States the enactment of laws to secure to authors the copyright of their books. Twelve of the thirteen original States passed copyright laws, and in most of these acts the object and policy of this legislation is set out by way of preamble. We find there the following declarations of principle and policy:

"The improvement of knowledge, the progress of civilization, the advancement of human happiness, and the public weal of the community greatly depend on the efforts of ingenious persons in various arts and sciences." (New Hampshire, Rhode Island, Massachusetts, Georgia, New York, North Carolina, New Jersey, Connecticut.)

"The principal encouragement such persons can have to make great and beneficial exertions of such nature must consist in the legal security of the fruits of their study and industry to themselves." (New Hampshire, Rhode Island, Massachusetts, North Carolina, Pennsylvania, Georgia, New York, Connecticut.)

"The principles of natural equity and justice require that every author should be secured in receiving the profits that may arise from the sale of his works." (Georgia, New York, Connecticut, New Jersey.)

"Such security (of the fruits of their study and industry to ingenious persons) is one of the natural rights of all men, there being no property more peculiarly a man's own than that which is produced by the labor of his mind." (Massachusetts, New Hampshire, Rhode Island, North Carolina.)

The subject-matter of copyright is designated as "works" in the acts of Connecticut, New Jersey, Georgia, and New York; as "that which is produced by the labor of his (the author's) mind," and "books, treatises, and other literary works" in the acts of Massachusetts, Rhode Island, and New Hampshire. The acts of Connecticut, Georgia, and New York use the word "writings" as well as "works," both in the same sense.

These laws were passed in the years 1783-1786—that is, between one and four years prior to the convention which framed the Constitution. The declarations of policy and principle contained therein were necessarily familiar to the framers of the Constitution. The effect of that instrument would be to supersede those State laws by Congressional legislation, and as the same legislatures who had so recently enacted copyright statutes were expected to consent to the superseding clause, those who drew that clause may be supposed to have taken into consideration the expressed views of the State legislatures. It is probable that the intent was to put into the concise possible language a mandate to Congress broad enough to embrace all that the States had declared for.

The intent, as it may be inferred from these circumstances, was to empower Congress to carry into the execution those principles of natural justice and equity which require that those who produce by the labor of their minds be secured in receiving all the profits which may arise from their works.

In the case of *Lithographic Co. v. Sarony* (111 U. S., 53) the United States Supreme Court points out that the framers of the Constitution may be supposed to have understood the nature of copyright and the object to which it was commonly applied, because the subject had then recently been thoroughly discussed in the judicial tribunals of England, and these discussions had attracted wide attention; and the court states that copyright as its nature was then commonly understood, and as it then existed in England, was "the exclusive right of a man to the production of his own genius or intellect."

This statement of the court is strongly enforced by the language that we have quoted from the State copyright laws, which is in part identical with the language that occurs in those important English copyright cases to which the Supreme Court refers.

If such was at the time of the adoption of the Constitution the common understanding of the nature of copyright, if it is shown that this common understanding was expressly adopted by the men who composed the lawmaking bodies of the States, the bodies which passed on the Constitution and whose leading members were among the framers of that instrument, it is safe to conclude that that understanding represents what was intended to be expressed in the copyright clause.

Those words of the clause which state the extent of the right and the manner of protection—"to secure the exclusive right"—are as broad as that common understanding—they include all rights, all the fruits and profits of intellectual labor, and all means necessary to effectually protect these rights.

The supreme object sought to be attained by the clause was "to promote the progress of science and the useful arts." It entered into the views of the framers that it is the interest and policy of an enlightened government to promote the dissemination of learning by inducing intellectual labor in works which would promote the general knowledge in science and the useful arts. They sought to stimulate original investigation whether in literature, science, or art, for the betterment of the people, that they might be instructed and improved with respect to those subjects, and to prompt the exertions of the individual in that direction. To accomplish this end they recognized that it was necessary to grant to the author "exclusive rights" to the product of his exertions, and consequently conferred upon Congress the power to effectuate this purpose. This power must be construed in the spirit in which it was given. A large discretion was intended to be lodged in the Congress with respect to the subjects which could properly be included within the constitutional provision and the nature of the protection to be given to stimulate authors and inventors, this discretion being bounded and circumscribed only by the general object sought to be accomplished.

But it is objected that the word "writings" is incompatible with a broad construction of the clause. The objectors claim that it narrows down the whole sphere of copyright protection; that it restricts not only the range of its possible subject-matter, but the extent of the right and the manner of protection. They manipulate this word so as to make it overshadow the entire clause, and make the clause appear as if it read: "By protecting against infringement, in writing, the author's right to reproduce his writings in writing." In other words, they claim that under this clause of the Constitution Congress can not protect the author against any form of reproduction of his works except such reproduction as assumes the form of a writing. So that a dramatic composition can not be protected against public performance thereof, a lecture against its public oral delivery, a piece of statuary against a photographic reproduction thereof, a painting against a stereopticon reproduction thereof by means of a magic lantern on a screen.

And for this view they hope to find support in the *Sarony* case.

But in the *Sarony* case the court points out that the First Congress of the United States, sitting immediately after the adoption of the Constitution, did not in the act of 1790 construe the word "writings" in its literal sense—that of actual script—but made maps and charts subjects of copyright, and that the Seventh Congress, in the act of 1802, added prints, etchings, cuts, and engravings. The court then remarks that "no one would now claim that the word 'writing' in this clause of the Constitution, though the only word used as to subjects in regard to which authors are to be secured, is limited to the actual script of the author, and excludes books and all other printed matter."

The court here puts its finger on the point that must defeat all attempts to claim a literal construction of the word "writings." That point is that, literally construed, it would exclude printed matter and everything except script by the author's hand.

But if a literal construction of this word is too absurd to be worthy of consideration, if a meaning broader than the literary sense must necessarily be accepted, is there any reason to stop short of that broadness for which the State legislatures had declared and which was then the common view, as the Supreme Court says in this very *Sarony* case?

On the contrary, all the circumstances make it probable that the word was intended to cover all literary and intellectual productions. And in this con-

nection it may be mentioned as significant that a "writing" is broadly defined as a "composure" in Johnson's Dictionary, the standard dictionary at the time when the Constitution was framed.

In the Sarony case the court, after showing the enlarged definition of the word "author" as signifying an "originator," "maker," "one who completes a work of science or literature," says that "by writings in that clause is meant the literary productions of those authors."

What did the court mean by literary productions?

Congress has from time to time extended the number of subjects of copyright. In 1790 it named maps, charts, and books; in 1802 it added etchings, engravings, prints, and cuts; in 1865 it further added photographs and the negatives thereof, and in 1870 statuary, paintings, chromos, and models or designs intended to be perfected as works of the fine arts.

The decision in the Sarony case was written in 1883, and the court probably referred to all the subjects enumerated in the extended list of the act of 1870 when it said that "Congress very properly has declared these (the literary productions of those authors previously defined) to include all forms of writing, printing, engraving, etching, etc., by which the ideas in the mind of the author are given visible expression."

The objectors to subdivision 1, g, have claimed that this sentence supports their position because it is said to restrict the scope of the word "writings" to visible expressions of the ideas of authors.

But this claim is based on a misunderstanding of what the court said.

The entire sentence reads:

"By writings in that clause is meant the literary productions of those authors, and Congress very properly has declared these to include all forms of writing, printing, engraving, etching, etc., by which the ideas in the mind of the author are given visible expression."

Only the first part of this sentence defines what the Constitution means; the second part characterizes the acts of Congress as viewed in the light of the previous definition. The court finds that what Congress did was included among the things that it had a right to do. The court does not say that Congress had no right to do more; on the contrary, the use by the court of the word "include" necessarily implies that the things mentioned do not comprehend all that Congress would have a right to do.

The things mentioned as having thus far been included, and properly included, by Congress among the subjects of copyright are further characterized as things "by which the ideas in the mind of the author are given visible expression."

The court does not say that this characteristic of being visible expressions is a requirement of the Constitution or that these things have been properly made subjects of copyright because they are visible expressions of ideas. The court simply states a feature common to all the things mentioned.

The court did not lay down a rule of construction or interpretation of this section of the Constitution for the guidance of Congress in enacting new copyright legislation or for the government of courts in passing on the same. It judicially approved the wide and liberal interpretation given by Congress to this section in extending copyright protection to the subjects enumerated in section 4952 of the Revised Statutes, viz, chart, engraving, cut, print, photograph or negative thereof, painting, drawing, chromo, statue, statuary, models and designs intended to be perfected as works of the fine arts, which under a narrow and literal interpretation of the word "writings" would not be entitled to protection.

The court had in mind and referred particularly to those subjects which the Congress had legislated upon up to the time of the decision.

There is nothing in this Sarony decision to justify the opinion that the court meant to make the fact of being "visible expressions" a necessary criterion of copyrightable subjects.

The court was considering the question as to whether the word "writing" was broad enough to cover a photograph which had been adjudged in a finding of fact to have been representative of original intellectual conceptions of the author. The court held this photograph to be a proper subject of copyright, not because of the fact of its being visible, but because of its being an original intellectual production. The court remarks that in cases of photographs which do not come up to this requirement, but are the ordinary productions of photography, a copyright may be no protection; adding, however: "On the question as thus stated we decide nothing."

The court throughout this decision takes the view that what the Constitution intended that Congress should protect was the "intellectual production," the "production of genius or intellect," the "product of intellectual invention," that which is "representative of original intellectual conception."

In no instance where any one of these terms is used is it modified by the word "visible."

The same view was taken in Trade-Mark cases (100 U. S., 82), where the court held that trade-marks which would certainly come within the definition of visible expressions are not proper subjects of copyright because they do not depend upon novelty, invention, discovery, or any work of the brain. "The writings," says the court, "which are to be protected are the fruits of intellectual labor embodied in the form of books, prints, engravings, and the like."

In *Higgins v. Keuffel*, (140 U. S., 428, 430), in construing article 1, section 8, it is said on page 431:

"This provision evidently has reference only to such writings and discoveries as are the result of intellectual labor. It was so held in Trade-Mark cases (100 U. S., 82), where the court said, 'while the word "writing" may be liberally construed, as it has been, to include original designs for engravings, prints, etc., it is only such as are "original" and are founded in the creative powers of the mind.' It does not have any reference to labels which simply designate or describe the articles to which they are attached and which have no value separated from the articles, and no possible influence upon science or the useful arts. A label on a box of fruit, giving its name as 'grapes,' even with the addition of adjectives characterizing their quality as 'black,' 'white,' or 'sweet,' or indicating the place of their growth, as Malaga or California, does not come within the object of the clause. The use of such labels upon those articles has no connection with the progress of science and the useful arts. It can not, therefore, be held by any reasonable argument that the protection of mere labels is within the purpose of the clause in question. To be entitled to a copyright the article must have by itself some value as a composition, at least to the extent of serving some purpose other than as a mere advertisement or designation of the subject to which it is attached."

In *Holmes v. Hurst*, 174 U. S., 82-89, the rule is laid down that—

"It is the intellectual production of the author which the copyright protects, and not the particular form which such production ultimately takes."

We have seen in the *Sarony* case that the court includes photographs, negatives, paintings, statuary, models, and designs among the forms in which the fruits of intellectual labor may be embodied.

Phonographic records of musical compositions are certainly as much like writings or books as are statues and negatives. And are they not visible?

The answer is that by visible is meant visible in such a form that it will be recognized by the sense of sight as the expression of the author's idea. But there is no authority for any such restricted definition.

The Supreme Court has not laid down any such rule. The leading text writers on copyright law do not take that view. On the contrary, these writers express the opinion that any embodiment of an author's idea which is sufficient to establish its identity is a proper subject of copyright, and that was the view taken by Justice Aston in *Millar v. Taylor*, 4 Burr., 2340.

Blackstone, the acknowledged head of all writers on the principles of law, says:

"The identity of a literary composition consists entirely in the sentiment and the language; the same conceptions clothed in the same words must necessarily be the same composition; and whatever method be taken of exhibiting that composition to the ear or the eye of another, by recital, by writing, or by printing, in any number of copies, or at any period of time, it is always the identical work of the author which is so exhibited." (Blackstone, 2 Com., 406.)

This quotation has been cited with approval in many American copyright decisions.

Drone, whose work on copyright is recognized as the standard American work on this branch of the law, says on page 6:

"It has been maintained that material substance is an essential attribute of property; \* \* \* that nothing can be the subject of ownership which is not corporeal. This is an error which has arisen from the assumption that materiality is essential to the determination of the identity of a thing. It is clear that a thing must be capable of identification in order to be the subject of exclusive ownership. But when its identity can be determined so that individual ownership may be asserted, it matters not whether it be corporeal or incorporeal."

" \* \* \* Whatever, then, having the other requisites of property, can be identified, becomes a proper subject of ownership. \* \* \* Indeed, so complete may be the identity of an incorporeal literary composition that, even when it has no existence in writing or print, it may be preserved in its entirety for ages in the memory, passing from generation to generation, from country to country. The composer will conceive and give expression to a musical composition without putting a note on paper. It is a creation, without material form, in the realm of the imagination; but so complete is its incorporeal, invisible form, so marked its individuality, so distinctly perceptible to the musical mind, that another will reproduce it 'by ear,' without the aid of written or printed notes."

On page 97 the learned author says:

"There can be no property in a production of the mind unless it is expressed in a definite order of words. But the property is not in the mere words alone, not alone in the one form of expression chosen by the author. It is in the intellectual creation, which language is merely a means of expressing and communicating. The words of a literary composition may be changed by substituting others of synonymous meaning; but the intellectual creation will remain substantially the same. This truth is judicially recognized in the established principle, that the property of the author is violated by an unauthorized use of his composition, with a colorable change of words; the test of piracy being not whether the identical language, the same words, are used, but whether the substance of the production is unlawfully appropriated. So an intellectual production may be expressed in any number of different languages. The thing itself is always the same; only the means of communication is different. The plot, the characters, the sentiments, the thoughts, which constitute a work of fiction, form an immaterial creation, which may be communicated by a hundred different tongues—by the labial or the sign language of the mute, the raised letters of the blind, the comprehensive characters of stenography. The means of communication are manifold; but the invisible, intangible, incorporeal creation of the author's brain never loses its identity. The Bible has been translated into all tongues, but its truths, its eloquence, its poetry have been the same to all nations.

Literary property, then, is not restricted to the one form of language in which thoughts are expressed, but is in the intellectual creation which is embodied in such language. This creation, in whatever language or form of words it can be identified, the author may claim as his property. That there can be no property in thoughts, conceptions, ideas, sentiments, etc., apart from their association, is clear, for they are then incapable of being identified or owned exclusively. But their arrangement and combination in a definite form constitute an intellectual production, a literary composition, which has a distinct being capable of identification and separate ownership, and possessing the essential attributes of property. The property is not in the simple thoughts, ideas, etc., but in what is produced by their association.

"The property in an intellectual production is incorporeal, and is wholly distinct from the property in the material to which it may be attached. Indeed, literary property may exist independently of any corporeal substance. It may be as perfect in a production expressed in spoken as in one communicated by written or printed words. A poem when read, a lecture when delivered, a song when sung, a drama when acted, may have all the attributes of property, though not a word has been written or printed. The true test is not whether the thing is corporeal or incorporeal, not whether it is attached to a material substance, but whether it is capable of identification so that exclusive ownership may be asserted. The identity of an intellectual production is secured by the language in which it is expressed; and this is true whether the language be spoken or written. When a composition has not been reduced to writing it may be more difficult, and in some cases impracticable, to prove the authorship and thereby to establish a title to ownership. But the manuscript is but a means of proof. And when the title to the ownership is not disputed or can be satisfactorily established without the existence of a writing, as it may be in many cases, it is immaterial whether the composition has been reduced to writing or has been communicated only in spoken words."

We take it that it is conceded by the opponents to section 1, subdivision (g), that a phonograph record or perforated roll embodies or represents a particular musical composition. It is designated by the same name or title, listed in catalogues, and sold as music under that title; its only purpose is to reproduce that particular composition; its value is dependent solely upon the reputation

of the composer and the merit and popularity of the composition. In the manufacture of perforated rolls the musical composition in the ordinary sheet music notation is strictly followed, each note being represented by a corresponding perforation, and these perforations constitute a record of that musical composition. Phonograph records are manufactured from a die or matrix so prepared and arranged in connection with a large horn that when a given musical composition is played or sung into the opening of the horn certain lines and indentations representing the sounds forming or identifying the composition are impressed upon the waxed matrix; so that here these impressions constitute a record of the composition.

Only recently several phonographic records embodying speeches made by the German Emperor expressly for that purpose were prepared for the Smithsonian Institution to be preserved for reference for future generations. These speeches so embodied in these phonograph records are just as truly and accurately recorded as they could be in any book. There is no written or printed copy of these speeches, but they can be as accurately transcribed into script as if they had been printed in type.

It must be admitted that a phonographic record of a musical composition is a sufficient embodiment of the author's idea to establish its identity. If the mechanism in connection with which the record is used produces that and no other composition, it is not because of the peculiar form of the mechanism, but because the record or disk or roll has been so formed as to be an embodiment of that composition.

It is objected that the embodiment of the idea on the phonographic record is in an incomplete form, too unintelligible to be entitled to protection as the expression of the idea.

But that is a feature that is peculiar to many intellectual products that are well recognized as proper subjects of copyright. A book written in cipher, shorthand, or in Sanskrit, would be unintelligible, unless it was translated. But that would not make the book unfit for being copyrighted. Likewise the raised letters or the system of protuberances or depressions for use by the blind as a means of communicating ideas to the blind through the sense of touch are unintelligible. So is a negative unintelligible unless it is developed. So are certain serial photographs used in so-called "moving pictures" unintelligible until they are exhibited on a screen.

The last-mentioned case is discussed by the United States circuit court of appeals, third circuit, in *Edison v. Lubin* (122 Fed., 240). Complainant's operator took in rapid succession on a highly sensitized celluloid film 4,500 pictures, each of which was a shade different from its predecessor and successor, representing the launching of Kaiser Wilhelm's yacht *Meteor*, and from this a positive reproduction was made on a solid sheet by light exposure, and by means of an appliance similar to a magic lantern these views could be thrown on a screen in rapid succession, so as to give the effect of actual motion and pictorially reproduce the launching. This positive solid sheet was registered with the Librarian of Congress, and copyrighted under title of "a photograph 'Christening and Launching Kaiser Wilhelm's Yacht *Meteor*.'" The defendant photographed these pictures on a sensitized celluloid film and sold them to exhibitors to enable them to reproduce the picture.

The court held the celluloid sheet to be a "photograph," and said:

"The negative and its positive reproduction represent one act or event, to wit, the launch of the yacht. This launch was portrayed on a single negative film by one operator and a camera, operated from a single point, and such negative simply photographically reproduces in continuous form the view of the launch presented to the eye of an onlooker at the spot occupied by the camera. The instantaneous and continuous operation of the camera is such that the difference between successive pictures is not distinguishable by the eye, and is so slight that the casual observer will take a very considerable number of successive pictures of the series and say they are identical. \* \* \* To require each of numerous undistinguishable pictures to be individually copyrighted, as suggested by the court, would, in effect, be to require copyright of many pictures to protect a single one.

"When we consider the positive sheet which was copyrighted, we have a stronger case. What was thus copyrighted was a single celluloid sheet on which a number of objects had been photographically printed or reproduced. That these objects were there portrayed by light action or photography is unquestioned. No matter how the negative was obtained, whether by numerous and successive exposures, is not here material. The statute provides for copy-

righting negatives; but the present issue is not whether the negative in question was one covered by the statute, but whether, when the negative as a whole was photographically reproduced, the reproduction was a photograph. On that point we feel assured. When the reproduction was made, complainant's celluloid negative simply possessed the reproductive capacity by light action incident to the photographic art. The image, which had been thrown by light reflected from the originals and passed through a camera to produce the negative, in the reproductive process produced the positive by light action passed through such transparent negative. The mere circumstance that such positive is pictured on a strip of celluloid, and not on a strip of paper, is immaterial. In either event the reproduction is a light written, and therefore a photographic picture or photograph. To say that the continuous method by which this negative was secured was unknown when the act was passed, and therefore a photograph of it was not covered by the act, is to beg the question. Such construction is at variance with the object of the act, which was passed to further the constitutional grant of power 'to promote the progress of science and useful arts.' When in recognition of the photographic art Congress saw fit, in 1865, to amend the act of 1831 (13 Stat. L., 540) and extend copyright protection to a photograph or negative, it is not to be presumed it thought such art could not progress, and that no protection was to be afforded such progress. It must have recognized there would be change and advance in making photographs, just as there has been in making books, printing chromos, and other subjects of copyright protection. While such advance has resulted in a different type of photograph, yet it is none the less a photograph—a picture produced by photographic process. From the standpoint of preparatory work in securing the negative, the latter consists of a number of different views, but when the negative was secured the article reproduced therefrom was a single photograph of the whole. And that it is, in substance, a single photograph is shown by the fact that its value consists in its protection as a whole or unit, and the injury to copyright protection consists not in pirating one picture, but in appropriating it in its entirety."

Does not the above reasoning apply as strongly to sound-writings, phonographs, as to light-writings, photographs?

The perforated roll or phonographic record is in many respects similar to the positive celluloid sheet. The sole useful and profitable function of each is to serve as a vehicle for communication or reproduction to the senses of the intellectual production embodied therein. Each is not legible or distinguishable until set in operation in connection with the mechanism to which it is adapted. But when once in operation the production embodied in the record becomes intelligible and distinguishable. In the case of perforated rolls and phonograph records the representation is addressed to the sense of hearing; the ear recognizes the composition embodied in the record, tells what it is, and there are conveyed substantially the same impressions and the same emotions are excited in the mind in the same sequence or order as is done by the original composition in ordinary music notation when played by hand on any musical instrument or sung by an artist.

The perforated roll or phonograph record serves the same purpose as the printed music on a sheet—a vehicle for communicating the ideas therein embodied to one of the senses. As was said in the great case of *Millar v. Taylor*, 4 Burr., 2303-2342:

"The printing of it (book) is a mere mechanical act, and the method only of publishing and promulgating the contents of the book. The composition therefore is the substance. The paper, ink, type, only the incidents or vehicle.

"The value proves it. And though the defendant may say 'those materials are mine' yet they can not give him a right to the substance, which (on whose paper or parchment soever it is impressed) must ever be invariably the same. Nay, his mixing, if I may so call it, his such like materials with the author's property does not render the author's property less distinguishable than it was before, for the identical work or composition will still appear beyond a possibility of mistake."

To distinguish one musical composition from another in ordinary sheet music notation requires a technical knowledge of the art of music. To the untutored mind a sheet of music is no more intelligible or distinguishable than the perforations or impressions on perforated rolls or phonograph records. When records embodying different compositions are set in operation in connection with the mechanism to which they are adapted, the most unlettered in music can distinguish one from the other.



The discussion on the meaning of the word "writing" may be summed up by quoting a statement found in the opinion of the United States Circuit Court of Appeals in *National Telegraph News Company v. Western Union Telegraph Company*, 119 Fed. Rep., at p. 297, to wit:

"Nothing, it would seem, evincing in its make-up that there has been underneath it, in some substantial way, the mind of a creator or originator is now excluded." (From copyright protection.)

It is safe to conclude that phonograph devices are proper subjects of copyright.

The objection to subdivision 1 (g), based on the word "writing" in the Constitution, is shown to be untenable, even if that subdivision attempted to make phonographic records, disks, perforated rolls, or cylinders subjects of copyright.

But, as has already been pointed out, this subdivision does not state new subjects of copyright, but enlarges the rights which shall be secured to authors in their works. The subjects of copyright which this provision is particularly designed to protect are musical compositions. And the opponents of this subdivision admit that musical compositions are writings. Musical compositions were protected under the act of the 31st of May, 1790. (See *Clayton v. Stone*, 2 Paine, 382.)

The constitutionality of the subdivision does not at all depend on the construction of the word "writing" unless it should appear that the rights of the author in his writings are restricted to the right to reproduce in writing and that the security to be extended to him is limited to protection against infringements in writing.

But nothing of the kind is shown. The language of the Constitution does not justify such a restricted meaning and the courts have never so construed it.

Here again the *Sarony* case may be cited in favor of a broad construction. Congress added, by the act of 1856, to the rights secured to the author the sole right of performing a dramatic composition, and this right was incorporated in section 4952 of the Revised Statutes. This apparently extends the author's right beyond that of reproducing in writing and the protection beyond that against infringement in writing. And since the decision in the *Sarony* case added protection against infringement by public performance was given by the act of January 6, 1897, section 4966 of the Revised Statutes was amended so as to secure to musical compositions the same measure of protection as was afforded to productions of a strictly dramatic character and for added means for the protection of dramatic or operatic works against infringement by performance. (U. S. Rev. Stat., Supp., Vol. II, p. 536.)

Section 4952 is referred to in the *Sarony* decision with the approving remark that the "Constitution intended that Congress should secure the exclusive right to use, publish, and sell, as it has done by section 4952 of the Revised Statutes."

The right to "use" would undoubtedly include the right to embody in the form of a photograph or perforated roll.

It must be realized by the objectors that the acts of 1856, protecting dramatic compositions against piracy by representation, and the act of 1897, extending the same protection to all musical compositions, are a complete refutation of the contention that a "writing" can be protected only against infringement in writing.

Realizing that their contentions must fall in view of the acts extending copyright to public representation and performance, they assert that these acts are unconstitutional. It is not conceivable that this absurd assertion will receive any weight. Nor is it reasonable to suppose that this Congress will draw into question the constitutionality of the act enacted by Congress in 1856, when it is remembered that for more than half a century dramatic works have been protected against representation under this very act, and the right of Congress to grant such protection has been firmly established and recognized by the courts. (See *Daly v. Palmer*, 6 Blatchf., 256; *Daly v. Webster*, 175 U. S., 148, and *Lithographic Co. v. Sarony*, supra.)

A refusal to grant the protection to dramatic and musical compositions against representation would have rendered ineffectual and nugatory the primary object sought to be attained by Article I, section 8, of the Constitution.

A dramatic composition is a literary work in which the narrative is represented by dialogue and action. A pantomime is a species of theatrical entertainment in which the action is wholly represented by gesticulation without the use of words. (*Daly v. Palmer*, 6 Blatchf., 256.) In each case the primary

purpose is representation. Music is designed to be sung audibly or interpreted by musical instruments. It is addressed to the sense of hearing. Upon the representation of a drama the "writing" itself is not represented; it is not exhibited as a picture thrown on a screen, but the ideas of the dramatist are reproduced by dialogue and action; so likewise upon the performance of musical composition, or opera, a succession of sounds forming or identifying the composition are reproduced.

It has been established at common law and recognized by our courts that "rules attending property must keep pace with its increase and improvements and must be adapted to every case" (*Millar v. Taylor*, 4 Burr., 2303), and copyright protection must correspondingly extend. As discovery, invention, and science create new forms of reproduction of intellectual works, the extension of copyright to such new forms should not be denied because unknown to the framers of the Constitution, and therefore not within the literal tenor of its language. It must be remembered, as stated by Chief Justice Marshall, that "the Constitution was intended to endure for ages to come, and consequently to be adapted to the various 'crises' of human affairs." (*McCulloch v. Maryland*, 4 Wheat., 316-405.)

The right of Congress to enact this legislation has been conceded by the circuit court of appeals, second circuit, in the case of *White-Smith Company v. Apollo Company* (147 Fed., 226), which was brought for the infringement of copyrights on two musical compositions by perforated rolls. The court said:

"We are of the opinion that the rights sought to be protected by these suits belong to the same class as those covered by the specific provisions of the copyright statutes, and that the reasons which led to the passage of said statutes apply with great force to the protection of rights of copyright against such an appropriation of the fruits of an author's conception as results from the acts of defendant."

Secondly. Another objection to section 1, subdivision g, is that it is an attempt to extend the control of the copyright proprietor over a sheet of music after the same has been sold to a purchaser and to deprive the purchaser of the right to make any profitable use that he can of the same.

It is contended that the purchaser of a sheet of music in the open market acquires an absolute right of property therein and is entitled to make all profitable use thereof, including the right to use the same for reproduction upon perforated rolls and phonograph records.

We have searched in vain for any respectable authority to support this contention. It is opposed to every principle of copyright and contravenes the position taken by Congress in section 4952 of the Revised Statutes, which was defined in the *Sarony* case as giving the author exclusive rights to "use, publish, and sell" the subjects enumerated therein.

Under the present copyright laws, section 4952, Revised Statutes, the owner of a book has the exclusive rights to translate and dramatize the same, and under section 4966, Revised Statutes, the exclusive right to publicly represent or perform such dramatization. Do the objectors mean to contend that the purchaser of a book can dramatize the book for public sale or performance?

It is well established that the author of a dramatic composition is entitled to the profit arising from public delivery or performance, to the sale of the manuscript, and to the printing and publishing of it. By the purchase of a ticket to a dramatic performance the general public acquire no right to reproduce the composition, either by taking notes or by the exercise of the memory. The spectator is entitled to the enjoyment of the exhibition, but there is no implication of abandonment by the author of his title or of surrender of his rights in the ideas. The spectator in paying for his ticket of admission has not paid for any right to get possession of the play for subsequent representation. (*Werckmeister v. American Litho. Co.*, 134 Fed. Rep., 323, 325.)

A similar contention to that of the objectors was raised in the case of *Millar v. Taylor* (4 Burr., 2303), and the answer there found is conclusive of the objection here. The court said:

"But it was said at the bar if a man buys a book, it is his 'own.'"

"What! Is there no difference betwixt selling the property in the work and only one of the copies? To say 'Selling the book conveys all the right' begs the question. For, if the law protect the book, the sale does not convey away from the nature of the thing any more than the sale conveys it where the statute protects the book. Can it be conceived that in purchasing a literary composition at a shop the purchaser ever thought he bought the right to be the printer and seller of the specific work? The improvement, knowledge, or amusement which

he can derive from the performance is all his own; but the right to the work, the copyright, remains in him whose industry composed it. The buyer might as truly claim the merit of the composition by his purchase (in my opinion) as the right of multiplying the copies and reaping the profits.

"The invasion of this sort of property is as much against every man's sense of it as it is against natural reason and moral rectitude. It is against the conviction of every man's own breast who attempts it. He knows it not to be his own; he knows he injures another, and he does not do it for the sake of the public, but *mala fide et animo lucrandi*."

In the case of *Publishing Company v. Smythe* (27 Fed. Rep., 914-921), it is said:

"The purchaser of the paper, leather, and twine does not necessarily purchase the literary property, and he can not use his ownership of the one to defraud the author of his property in the other."

Lord Mansfield defined copyright "As property in notion, without corporeal, tangible substance," and said upon this subject:

"No disposition, no transfer of paper upon which the composition is written, marked, or impressed, can be construed a conveyance of the property (by which he means copyright, as appears from a previous part of his opinion) without the author's express consent, 'to print and publish,' much less against his will."

A purchaser of a copperplate engraving of a copyrighted composition, seized and sold under an execution against the copyright proprietor, does not acquire the right to strike off, publish, and sell, copies of the same. This is based upon the theory that the copyright is an independent right detached from the physical copyrighted property out of which it arises, and is capable of existing and being owned and transferred independent of the other. (*Stephens v. Cady*, 14 How., 528; *Stephens v. Gladding*, 17 How., 447; *Patterson v. I. S. Ogilvie*, 119 Fed. Rep., 451.)

Copyright means exclusive right to control and sell, and the principles of copyright in that respect are analogous to those of patent rights, and are so treated in the Constitution, where protection for both is secured by the same clause of the Constitution in language that indicates association of thought.

Upon examining the patent cases we find that upon the sale of a patented article the owner of the patent does not part with control over the article sold. (See *Beman v. Harrow Co.*, 186 U. S., 70; *Heaton v. Eureka*, 77 Fed. Rep., 288; *Edison Phonograph Co. v. Pike*, 116 Fed. Rep., 863; *Victor Talking Machine Co. v. The Fair*, 123 Fed. Rep., 424.)

Further discussion of this contention, in the face of the overwhelming authorities against it, would neither be profitable or useful.

Thirdly. It is further objected to section 1, subdivision (g), because it proposes to interfere with "vested rights" and is therefore unconstitutional.

"Vested rights" in what? In the future productions of the musical minds of the country? It must be noted that the proposed legislation is not retroactive. It does not affect compositions copyrighted prior to the enactment of the law. All music in the public domain, and those copyrighted up to the time of the enactment of the law, are left free to the manufacturers of perforated rolls and phonograph records to be exploited and appropriated. The section deals expressly with the works to be written by the composer of the future. But the objectors contend that their patents give them the unlimited right to exploit and appropriate any composition that may be written during the life of the patent and its renewal, and that any law enacted to restrict this right is an infringement upon their vested rights in their patents. The absurdity of this proposition is apparent on the face thereof.

The letters-patent granted to the inventors of these perforated rolls and phonograph records, and improvements thereon, secure to them the right to manufacture contrivances adapted to reproduce sound. That is the extent of the right. It does not carry with it the further right to appropriate the copyrighted musical composition of any composer. There is nothing in the letters patent or in the patent laws or in the Constitution from which these rights emanate that can be construed as granting to the owner of a patent the right to deprive any man of his property or to exploit the intellectual productions of that man without fair compensation. Nor is there anything in the section which permits the composer of a musical composition, copyrighted after the act shall have gone into effect, to appropriate without compensation any device protected by patent. The composer would have no right to combine his composition with any patented invention and put the same on the market without the consent of the owner of the patent. Then, why should the owner of a patent have the right

to use a copyrighted composition, without the owner's consent, in connection with his invention?

The owners of the patents to appliances adapted to reproduce photographs and paintings upon screens by means of magic lanterns might urge with equal consistency that their vested rights are being invaded by the limitation of their right to the reproduction of only such pictures and paintings as are in the public domain or that they can obtain from the copyright owners.

The contention that these patent owners have vested rights in the offspring of the brain of American composers is in violation of every principle of ethics, equity, and natural justice. They would not attempt to urge the contention that if in order to make their patents profitable it was necessary to combine therewith ordinary personal property, they would thereby acquire any rights in any such personal property. The great principle on which the author's right rests is that it is the fruit or product of his own labor, and that the labor of the faculties of the mind establishes a right of property as sacred as that created by the faculties of the body. A literary man is as much entitled to the product of his labor as any other member of society, and the right to literary property is just as sacred as any other property and is entitled to the same protection that the law throws around the possession and enjoyment of other kinds of property.

This industry devoted to the manufacture of perforated rolls and phonograph records is essentially parasitic. It thrives by exploiting the productions of American composers, their names, and reputations. It exercises no productive effort in the art which it exploits. It does not stimulate original work. It waits until the composer and publisher have created and met a popular demand for a piece of music, through the expenditure of money, time, and labor; then it swoops down upon and appropriates that composition for use upon its machines, to its own unjust enrichment. It acquired great wealth, influence, and power by sponging upon the toil, the work, the talent, and genius of American composers.

And carried away by the success of this iniquity, these manufacturers have become imbued with its righteousness to such a degree that they regard the exploitation of American genius and the appropriation of its creations to their own enrichment as their vested right, and this bill which is to secure to the American composer no more than his just due—the full fruits of his labor—as an assault upon an inviolable right.

They admit that a phonographic record without the use of the name of the composer and the title of the composition with which his name is associated would render the record valueless as an article of merchandise; that the value of the record increases in accordance with the reputation of the composer and the merit of his composition. We wonder whether they claim that their patents give them a vested right to invade the right of privacy of the composer to exploit his name and reputation as an advertising medium for their wares?

But their selfishness is suicidal. It is a fact shown by a comparison of the industries that with the increase of the sale of their mechanical devices the sale of sheet music decreases. The hope of reward, this great incentive to original work, is thus taken away from the composers by the policy of these manufacturers, and the production of original compositions is discouraged. The inevitable result will be that the composers will refuse to give original compositions to the public for the sake of a copyright protection which will no longer protect. Then will the parasite that kills itself be killed.

Fourthly. The objectors seek to defeat this legislation by taking advantage of the popular clamor against trusts and monopolies, by urging that the enactment of this legislation would give legislative sanction to a conspiracy in restraint of trade alleged to exist between the Aeolian Company and the Music Publishers' Association.

In our statement before the Committee on Patents of the Senate and House of Representatives we answered that charge and in most positive terms denied the existence of any such criminal combination. (See Arguments Com. Pat. H. R. on H. R. 19853, pp. 202-206.)

And if such a combination does in fact exist it is not shown that a single composer is a party to or has sanctioned it. This legislation is intended primarily for the benefit of the composer. The sins of a few publishers should not be visited upon a great number of innocent composers, and it would be equally unjust that all publishers should be punished for the alleged wrongs of a few.

The new bill makes the right to use musical compositions for perforated rolls or phonographic devices a separate and independent estate, subject to assign-

ment, lease, license, gift, bequest, or inheritance (sec. 38). The composer has the right under this section to dispose of the mechanical-instrument rights in his composition independent of the publishing rights, just as under the present law the publisher does not control the performing rights to any composition. The composer grants the performing rights to the theatrical manager and the publishing rights to the publisher, and each is independent of the other. It is more than likely that the same conditions will prevail with reference to the mechanical rights. The composer will go into the open market and let the mechanical rights to his compositions to the highest bidder. The one whose contrivances have reached the highest standard of perfection, whose devices give the best interpretation and representation of the author's work, will in many cases get the rights.

Most of the composers are not under contract with any publisher, and many do not know to whom their next work will go.

There is no foundation for the claim that the enactment of this legislation will sanction any such combination as is alleged to exist.

It is expressly held in the case of *Bobbs-Merrill Co. v. Strauss* (139 Fed. Rep., 155) that—

"There is no sanction or support whatever to the doctrine that the several owners of distinct patents, each having a monopoly of its particular patent, or the several owners of distinct copyrights, each having a monopoly of his particular copyright, may combine and conspire as to their patented articles, or as to their copyrights or books published under and protected thereby, to restrain interstate commerce, in articles made or produced thereunder. The right or privilege to form such a combination or conspiracy is not embraced or included within the monopoly granted."

To the same effect see *Beman v. Harrow Co.*, 186 U. S., 70.

Under these decisions the administrative officers of the Government can institute proceedings under the Sherman Act against the parties to the alleged combination. The objectors should submit the proof of its existence to the Attorney-General for action, instead of making this monopoly charge with a view of influencing Congress to refuse relief to composers against the unjust appropriation of their property and the exploitation of their names and reputations for the unjust enrichment of the mechanical-instrument manufacturers.

Some of the objectors, realizing the weakness of their various contentions and that they have failed to advance a single argument founded in fact or based on reason why this legislation should not be enacted, suggest that the composer could be sufficiently protected by permitting every manufacturer of these mechanical devices to secure the right to use the compositions on payment of a reasonable royalty, the payment of the royalty not to be in recognition of any legal right of the composer, but, as one of them says, "on ethical principles" (see "Arguments," p. 108), or, as another explains, because the name and repute of the music and of its author may contribute to the sale of the reproducing devices, and a commercial value attaches to such name and title which is of benefit to the seller of the reproducing devices; and that for this the composer should receive a royalty. ("Arguments," pp. 192, 193, 196.) Another suggests that the composer should have the right to collect reasonable royalties from manufacturers who may wish to use his compositions, leaving it to a court of equity to determine what royalties shall be deemed reasonable. ("Arguments," pp. 133, 190.) Others are opposed to the extension of the protection upon any condition. ("Arguments," pp. 172, 139-146, 155-156.)

These suggestions are in keeping with some of the proposed amendments that the manufacturers of mechanical devices have submitted to the bill; for instance, to substitute the word "writings" for the word "works" in section 4 and wherever that word appears in the bill, because it is in contravention of the Constitution ("Arguments," pp. 139-171-173), the apparent purpose of this amendment being to have such a construction placed upon this word in the bill as to afford an opportunity for a legal contest to secure a nullification of the objects sought to be attained by this legislation.

The suggestions to pay a royalty have a look of fairness and are undoubtedly made by these manufacturers with a view of impressing Congress with the idea that they are actuated by motives of equity. But as the plan comes from a quarter where fairness to the composers has not heretofore been at all visible in practice, it may be well to examine it with a critical eye. On such examination it will be realized that the plan, if incorporated in the bill, would probably furnish a sufficient lever for overthrowing this part of the bill entirely on the

ground of unconstitutionality. A provision which would grant a license without the author's consent would certainly not be consistent with "the exclusive right" which the Constitution authorizes Congress to secure. The fact that such a provision would subject the composers as a class to restrictions in the use of their property that other authors and inventors are not subjected to and that this restriction would, moreover, destroy the composers' freedom to contract with respect to their property, points to other serious constitutional objections.

Besides the question of unconstitutionality, the plan is not practicable, and the rights of the composer could not be enforced under it.

The following questions naturally suggest themselves to one's mind: How shall the reasonableness of the royalties of the composer be determined? By whom and in what manner will the decision be enforced, and what penalty is to be imposed for its disregard? Upon what basis shall the royalty of the composer who writes a mediocre composition embodying just enough intellectuality to make it the subject of copyright be determined? And, on the other hand, upon what basis the brilliant composition of the eminent composer, which took months in conception, fruition, and development, and which has great merit and popular approval? What should be the mode of procedure in establishing the reasonableness of the royalty? Even if the procedure could be regulated, of which we have great doubt, the law's delays and the expense of litigation would be sufficient to discourage any composer from attempting to establish his rights. And, again, what protection will he have against the unscrupulous manufacturer? A relationship of confidence and trust must exist between composer and publisher or manufacturer, because his royalties are dependent upon the sales made and the keeping of accurate books. In any event it is evident that the composer would be at the complete mercy of the manufacturer. These are considerations that must be kept in mind. The composer should have the right to select the man who shall arrange his composition for mechanical reproduction; to say how it shall be arranged and upon what terms sold. This to protect his artistic as well as financial interest.

The plan is subversive of every principle of copyright, which means a monopoly of control and sale of the subject protected.

It is the knowledge that the author can go into the open market with his product and sell it to the highest bidder upon the best possible terms that stimulates him to exercise his ingenuity. It is this principle also that makes the publisher exercise his efforts to secure the best compositions to make his business profitable by meeting competition.

The artistic side of this question is also to be considered.

While it must be conceded that some of the manufacturers make every effort to make their records and rolls of the highest standard of perfection, so as to accurately reproduce in the most artistic manner the composition of the author, in the same manner as he would if he himself were the manufacturer, there are competitors in the field, however, whose sole object is gain and who give to the public feeble, mutilated, and distorted versions of the original composition. For instance, a composition is written which requires a performance of five minutes. A manufacturer having no regard for the sensibilities of the author will prepare that composition for a record which can run in operation but for three minutes, owing to the limited possibilities of the reproducing contrivance, by cutting, mutilating, and distorting it; he interprets the composition not as the artistic judgment of the artist dictates, but as the business conditions demand. So at best the public gets but a feeble imitation of the original and in many cases forms its opinion as to the capacity of the composer and the merit of his work from these miserable imitations, to the mortification and injury of the composer.

The composer, therefore, should be left free to sell his rights whenever and to whomsoever he pleases, as is the right of all other creators of intellectual property.

The further objection to this proposition is that it would create a dangerous precedent in copyright legislation, a pernicious system of government price making as applied to individual property.

We desire to add a word in favor of section 25 of the proposed bill, which makes it a misdemeanor to willfully and for profit infringe a copyright.

A musical composition is inherently different from any other subject of copyright and requires protection by criminal provisions for the reason that the cost of production of a sheet of music is very small. The career of a popular song is usually very brief, and the returns are frequently very large. It is not

an uncommon thing for a popular song to reach a sale in the hundred thousands. It is sold in music stores, stands, carts, etc. The cost of production being small, while returns are frequently large, music is an attractive field for pirates and petty grafters, who have no regular place of habitation, no financial responsibility, and for whom injunctions, civil damages, and penalties have no terror; and it is against these barnacles on the music-publishing industry that this legislation is aimed.

A song is made popular by the expenditure of a great deal of money in advertising it, bringing it to the public's notice by ordinary advertisements, by the gratuitous distribution of expensive band and orchestra arrangements thereof to hotel and other orchestras, and in numerous other ways. When the publisher has succeeded in creating a popular demand for his composition, the pirate makes a raid and reprints thousands of copies of the song, floods the market with his counterfeits, and sells them to hucksters, stand keepers, jobbers, and dealers. The counterfeiting is usually done by means of photo-engraved plates, so that the ordinary purchaser can hardly detect the difference between the genuine and the counterfeited copies. The consequence is that the publisher and composer are irreparably injured and not only lose profits, but their actual investments.

As a specific instance of this form of plunder the case of Garret J. Couchois may be mentioned. He was convicted in the court of special sessions, New York City, on the 28th of October, 1905, for counterfeiting the trade-mark of Carl Fischer, a publisher, in connection with a song owned by Fischer, entitled "Hearts and Flowers," and was sentenced to thirty days in the city prison and fined \$350. The conviction was unanimously affirmed by the appellate division. And subsequently he pleaded guilty to counterfeiting other publishers' trade-marks.

This man conceived the gigantic scheme to reproduce every successful and popular number in the musical market. Under the assumed and fictitious name of "Jones," Couchois went to a photo-engraver, the Empire State Engraving Company, of New York City, with genuine copies of musical compositions belonging to different publishers and had them photo-engraved. The photo-engravings were exact plate reproductions of the originals. These plates were sent by him under the alias of "Jones" to a printer, "the Wilson Press," and thousands of copies were printed and shipped to Rutherford, N. J.

In the case of "The Holy City," published by Boosey & Company, an English company, each of the genuine copies was stamped in ink with the signature "Stephen Adams," the object of which was to insure its genuineness. But Couchois could not be foiled in his operations by any such device. Promptly he had a stamp made simulating the signature of Stephen Adams and impressed it on every one of the counterfeited copies. He then went to Boosey & Co.'s store in New York, purchased ten copies of "The Holy City," and demanded an invoice of his purchase, which was given to him; this invoice he changed to read 10,000 and made erasures in the price indicated in the invoice.

By means of this forged invoice and upon the representation that Boosey & Co. had sold them for export at a greatly reduced rate he was enabled to sell them to New York jobbers. Agents in his employ sold the counterfeited copies in Chicago, Philadelphia, and other cities. The counterfeits were sold at much less than the prevailing market prices of the genuine copies.

So deftly was this work done, so exact and skillful the reproductions, that even Wilson, who printed the counterfeits, was unable to distinguish between the original and the counterfeit. With such secrecy were these operations carried on that months elapsed before the piracy was detected. The music market was flooded with counterfeited reproductions of every successful and popular song, and the music publishing industry, involving the occupation of large capital, the employment of labor, and the sustenance of composers, was at the complete mercy of this one pirate, and many were threatened with financial ruin.

The structure of the music industry began to tremble, and such was the magnitude of this man's operations that if he had been permitted to continue for another year, the legitimate music publishing business would have been completely wiped out.

The copyright law was entirely insufficient to cope with the situation. The pirate carried on operations throughout the country. The courts will not grant an omnibus injunction to cover every composition published. An injunction against an individual composition is of no avail, because by the time service

is effected on an elusive character as this pirate he succeeds in flooding the markets with the reprints. But even if he were served with the order in time, there is nothing to prevent his numerous confederates from continuing the operations where he left off. Whatever property this pirate had was held in the name of his wife, and as to damages and penalties he was execution proof.

Couchols was aware that the copyright laws contained no criminal provisions, and would have been able to continue his depredations with impunity if it were not that he made one grave error, viz, to include the publisher's imprint on the counterfeit copies. In doing this he transgressed the laws of the State of New York.

The New York authorities came to the rescue of the music publishing industry, and instituted criminal prosecutions, the photo-engraver and printer turned State's evidence, and Couchols and one of his printers were convicted. The pirate fought the prosecutions with great vigor, engaged the best counsel and urged in defense that he violated the copyright laws and that he could be punished for that only, and that the New York courts had no jurisdiction in the matter. The courts ruled that if he had omitted the trade-marks from the pirated music they would have had no jurisdiction. Since Couchols's conviction other pirated copies of music have appeared on the market.

Conditions in England respecting piracy were as bad as here, and by the act of 6 Edward VII., chapter 36, passed August 4, 1906, the pirating of music was made an offense punishable on summary conviction, and on a second or subsequent conviction to imprisonment with or without hard labor for a term not exceeding two months or a fine not exceeding £10.

Prior to the enactment of the misdemeanor clause, section 4966 of the Revised Statutes in 1897, similar conditions prevailed with reference to dramatic and operatic performances. The moment a play attracted public attention irresponsible pirate managers produced the play in every part of the country and the dramatist and manager were robbed of the fruits of their labor; and play writing and producing were greatly discouraged. It is with great pleasure that we note that since the act of 1897 but one prosecution was commenced under the act, and piracy in this direction has wholly ceased. The law acts as a deterrent, and the great progress we have made in the dramatic art is directly traceable to this salutary legislation.

Acts similar to section 4966 of the present law have been enacted in New Hampshire, New York, Louisiana, Oregon, Pennsylvania, Ohio, New Jersey, Massachusetts, Minnesota, California, Wisconsin, Connecticut, Michigan, which acts protect uncopyrighted dramatic works.

Dated, New York City, December 6, 1906.

Respectfully submitted.

NATHAN BURKAN,  
*Counsel Music Publishers' Association.*

#### STATEMENT OF MR. J. L. TINDALE.

The CHAIRMAN. Mr. Tindale, whom do you represent?

Mr. TINDALE. Mr. Chairman, I am a member of the executive committee of the Music Publishers' Association of the United States, and wish to speak to you on behalf of the American composers of music.

Mr. BONYNGE. Did you address the committee last spring?

Mr. TINDALE. No; not on this subject. I was in Washington on another matter. It may happen that two or three of the points that I touch upon may be those that have already been spoken about, but I will ask the committee to bear with me, because I have every reason to believe that this paragraph here is going to be the object of a very severe attack, and we should like to have the committee know the position of the musical composers on that paragraph. I would like to add also that so far as I am authorized to speak, it would be immaterial to us whether this paragraph g should remain as it is or be incorporated as a part of paragraph f. The same opposition will be encountered in any event, I am quite sure. So far as I represent the



composers of music, it is not solely that they object to the production of music on the machines, but it is the reproducing of the copies, the disks, the cylinders, and the sale of that without any payment.

The CHAIRMAN. As I understood, some one stated this morning that by giving the party notice the composer could successfully prevent the use of his composition in the manner in which they now complain.

Mr. TINDALE. My understanding is that they could under this proposed statute.

Mr. BURKAN. They could not under existing law.

Mr. TINDALE. We have claimed heretofore that they can control the performing rights; but that is a different phase of this subject.

The CHAIRMAN. That is the phase of the subject that I have in mind.

Mr. TINDALE. What I particularly speak of is the reproduction of rolls and disks.

Mr. SOUSA. Lots of publishers now put on their title-page "Reserved from use by mechanical instruments," but it has no effect. They are used for machines just the same.

Mr. TINDALE. As I have said, I appear on behalf of the Music Publishers' Association, which has requested me to address you in behalf of American composers of music. These comprise a body of reputable and useful citizens who are without any organization. They are largely dependent upon music publishers for the protection of their business interests.

The one point about which it is desired to address you is contained in paragraph g of section 1, which will probably come to be known as the talking machine and self-playing piano clause.

For the purpose of this discussion I ask that the term "talking machine" be taken to include self-playing pianos, perforated rolls, and all machines or devices for copying or reproducing music automatically.

It is also requested that all court decisions based upon existing statutes be dismissed from the mind, since what we are seeking is a new copyright bill, based upon conditions which did not exist when the present laws were enacted.

The makers of talking machines and records appropriate to themselves and engrave and sell copies of a composer's copyrighted works without the composer's consent and without paying any compensation. I shall hope to show you that this is—

First. A moral wrong and an injustice as between man and man.

Second. A violation of accepted and established rules of business.

Third. An usurpation of a right authorized by the United States Constitution to be granted by Congress.

Permit first a word about composers as a class. "Let me write the songs of a nation and I care not who may make its laws" is, like most epigrams, an exaggeration. It is, however, none the less true that composers are not without value or influence in a nation's affairs. "The Star-Spangled Banner" and John Philip Sousa's "Liberty Bell" are known around the world and are heard in remote corners of the earth where as yet the essence of liberty itself is a thing unknown. "Home, Sweet Home," "Annie Laurie," and "Suwannee River" will be loved and remembered and will have their gracious influence over the hearts of men when those who now make our

country's laws are passed away. The names of Richard Wagner and Mozart will be known and revered after the names of emperors are forgotten.

American composers being then without question entitled to grateful recognition and fair treatment from this nation, you are respectfully asked as one of its lawmakers here to consider the rights and interests of composers as affected by paragraph g. It is around this paragraph that the principal opposition to the bill has centered, and paragraph g is to be the main point of attack, an organization having, it is understood, been formed for that purpose.

The issue is thus squarely between (a) several large and powerful business concerns engaged in manufacturing talking machines and records, self-playing pianos and perforated music rolls, on the one hand, and (b) American composers on the other.

The latter are as a rule persons of limited income, while the talking-machine and piano-player manufacturers represent large combinations of capital. They have built up huge interests and are earning large profits from use of the composer's works, for which they allow the composers no compensation. To correct this injustice is the aim and purport of paragraph g.

Paragraph g proposes to give to the composer—what should already be his—the right to reproduce his works for all kinds of instruments or machines, automatic or otherwise. His claims are based upon the following:

(a) The fruit of man's brain is property as truly as are the more tangible products of the mine, the field, or the forest.

(b) The ownership of his works—which is to say, copyright, or the right to copy—should of a right belong to the composer absolutely, whether the copying be by—

Pen and ink.

Hektograph.

Round notes printed upon paper, as for the ordinary piano or orchestral instruments.

Tonic sol-fa notations.

Shaped or "buckwheat" notes, as used in the last century.

Spiral indentations upon wax cylinders or gutta-percha disks, as for talking machines.

Raised characters, as in the Braille system for the blind.

Square or round holes punched in paper, as for self-playing pianos.

Notation transmitted electrically or by some other device yet to be perfected.

The right to copy belongs solely and absolutely to the inventor of the musical idea under whatever process may be used to convey the musical impression to the hearer.

Any less rights than those enumerated above would give to the composer only a partial or a defective title to his property. It would be less than the "exclusive right" mentioned and authorized by the Constitution; for the Constitution places a limit on the time only and none whatever upon copyright ownership itself. We here lay claim to the full and literal meaning of the words "exclusive right."

(c) Aside from the question of revenue, composers should have the right to say by whom and in what manner their music shall be

engraved or copied for reproduction on automatic instruments or machines. In their haste to make use of the name and works of famous composers the makers of talking machines and of automatic instruments often take the liberty of making their own garbled and distorted arrangements, adding to or leaving out important parts of the compositions. Also it frequently happens that compositions intended for grand orchestra or for full military band are conveyed or copied on the records by use of a "scratch" orchestra or by an inferior band—all the above having the effect of belittling the composer and injuring the standing and reputation of his works. Mr. Victor Herbert has stated that he has thus often heard his best compositions so reproduced as to be scarcely recognizable and so as to cause him humiliation and shame.

It is claimed, therefore, that for the cause of music itself, as well as by his personal right, the composer should own and control the copying of his works for use of automatic machines.

(d) As a rule, the composer's only revenue from his writings is from the sale of the printed copies by his publisher, who pays him a royalty on the sales. It is claimed, however, that the sales of almost any piece of music that becomes popular is far greater in the form of talking-machine records and automatic piano rolls than the sales of the sheet music. On the latter the composer has his publisher's royalty, but from the records and rolls he receives absolutely nothing. He frequently suffers an injury besides, for the ear of the public is soon surfeited by flooding the market with an inferior production and one which has cost the manufacturer nothing but the price of the material.

We claim this to be a gross injustice to the composer, measured by any standard we please, of morals, equity, or business. To show that the loss suffered by composers is not imaginary nor of small account, we refer to the Victor Talking Machine Company, which some months ago published in the press a series of demonstrations addressed chiefly to piano dealers. It was shown and proven by actual figures that the sales of talking-machine records and supplies had reached such a successful volume that the dealers of the country could do a larger business and make a greater annual profit in the sale of their goods than could be made in the sale of pianos or any other musical merchandise. It is believed that the figures shown were truthful and correct. These were large in amount, but whether they were comforting to the composers of this country, whose property and whose livelihood were being enjoyed by others at their expense, is open to grave doubt.

The talking-machine companies virtually admit the merit of our claims, for anyone reproducing or making a copy of one of their records or disks would be prosecuted by them for infringement, notwithstanding that they themselves had appropriated the music without the composer's consent.

Mr. JOHNSON. May I ask the gentleman if the machine company can not go on and use the works of Beethoven and Bach and many others, copyrighted before the passage of this bill?

Mr. TINDALE. We are speaking only of copyrighted works.

Mr. JOHNSON. But his business is not going to be broken up by this bill.

Mr. TINDALE. No; you are right about that. He has a very large field to choose from, the whole world.

Mr. CURRIER. How long do you think one of these concerns which could not get any new music would stay in existence?

Mr. TINDALE. The new music that is being produced cuts very little figure. In the musical world there are new compositions being made almost without number that would be acceptable to these people in countries where they are not copyrighted, in America.

Mr. CURRIER. Do you think a man buying a talking machine would be likely to purchase one that would not reproduce the music of Mr. Herbert or Mr. Sousa, or that that machine could successfully compete with a concern that sold a machine that would do it?

Mr. TINDALE. I admit that that helps it to go; but there is a very easy way for them to reproduce the works of Mr. Sousa.

Mr. CURRIER. I would like to have you suggest how.

Mr. TINDALE. The easy way would be for them to buy it from Mr. Sousa.

Mr. CURRIER. Exactly; but some other man has acquired that already.

Mr. TINDALE. I would like to speak of that briefly before I close, and will do so.

In conclusion, a few analogous cases may serve to illustrate the nature of this claim.

Twenty years ago a musical composition reduced to writing and copies printed on paper was the limit of use for that composition. It has now been found, however, that such a composition is useful and is essential to the inventors and makers of talking machines and other devices. This new and unexpected use of the composition forms a by-product, so to speak, of the original creative act of the composer. It is indisputable that a by-product belongs to him who created it, unless he chooses to throw it away. Manufactures and the arts are full of examples. Only two or three will be noticed.

(1) If one invents a sewing machine for sewing linen, and afterwards learns that it can be used for sewing leather, shall he not profit by this double value and usefulness of his invention? And may the sewing of leather be taken from him because he first invented the machine only for sewing linen?

(2) A farmer sows a field of buckwheat primarily to supply his bees with material for honey. If he finds afterwards a demand for buckwheat by those who would make it into flour, shall he not profit by the increased market for what his field has produced? And can it be seized for grinding by those who will, because he planted it only for honey?

(3) A case so closely analogous as to be almost identical would be that of a manufacturer of a patented article whom we shall designate as A, who could not operate his invention without use of a certain part or device already patented by B. It is plain that B, as owner of the ground patent, may name the terms on which A can be allowed to use his device and may also decide whether he may use it at all. Now, the talking-machine and music-roll men and the composer of music stand in the identical relation held by A and B. The manufacturer can not reproduce music without using the composer's copyrighted property. I submit, seriously, that the composer's case could

safely rest upon this claim alone, waiving, if necessary, all other considerations.

As a final illustration, I refer to what is known as wire tapping. It is possible for evil-disposed persons with proper appliances to make a connection with the wires of a telegraph company, to intercept messages passing along the wires, to make use of the information thus obtained for their own purposes, and thus profit by use of a commodity which they neither created nor paid for. This is a crime, and is punishable by severe penalty. This case is not mentioned as a direct analogy, for I concede that what the talking-machine men do is not a crime, according to existing laws; neither do they go about it in secret. But it is none the less true that in taking over for their own uses a musical composition, to use it and to make money out of it without the composer's consent, they are doing that which in the case just cited would be contrary to law. It is right that the telegraph company should be thus protected, but equal justice to all would require that the only commodity produced by a composer should be his property absolutely, to own and to dispose of for his own benefit.

American composers, therefore, do not ask for charity, nor for special privilege. They simply demand the same control and ownership of their creations as is accorded to others. They claim "the exclusive right to their respective writings and discoveries," as named in Article I, section 8, of the Constitution of the United States.

I was asked a question a few moments ago which doubtless referred to an existing agreement or contract between the Æolian Company and certain publishers. I think that was the point that was in mind.

The CHAIRMAN. Yes; one that exists, or may exist.

Mr. TINDALE. I should like to state that Mr. Bowers, the president of the Music Publishers' Association, will address you on that subject. I desire only to say one word on the subject, and for this reason, that I represent one of the foremost musical publishing houses, and our house signed one of these contracts or agreements.

Mr. LEGARE. Have you that contract here?

Mr. TINDALE. Yes; I have it here. It is already in the record. Our house signed such an agreement, giving to the Æolian Company the exclusive right for a term of years under certain conditions, and those conditions will be explained to you by Mr. Bowers. That agreement has perfectly proper limitations, as I think you gentlemen will concede. What I wish to say is this, that even if that agreement should be found to be binding, at the present time we deny, and in fact have notified the Æolian Company, that having failed to successfully defend their claim, we consider we are not any longer a party to it. We have notified them, and have received no protest from them.

Senator SMOOT. They have failed to defend?

Mr. TINDALE. They have failed to successfully defend their claim to reproducing rights constituting a separate piece of property.

Mr. CURRIER. That case is still pending before the Supreme Court of the United States, is it not?

Mr. TINDALE. Yes; that is true. What I wish to speak of is

that no matter if this agreement is claimed to be valid and still in effect, we no longer have these reproducing rights. In the contracts that are given to us nowadays the composers reserve to themselves in the following language:

John Smith reserves to himself the exclusive right and license to reproduce or cause to be reproduced said compositions on mechanical instruments, etc.

We no longer have that right. The composer reserves it to himself, and the reason I mention this is that the Æolian Company could get no monopoly from us.

The CHAIRMAN. Could not that company obtain such monopoly from others?

Mr. TINDALE. That I can not speak of, but I imagine that the others are compelled to do about the same thing that we are compelled to do; that is, the composers do not now give to us that right, and certainly we can not pass on that right to the Æolian Company if the composers do not give it to us.

Mr. WEBB. When was that new form of contract inaugurated?

Mr. TINDALE. This is merely an assignment of copyright to our house.

Mr. WEBB. When was that form prepared, reserving the right to the composers?

Mr. TINDALE. About a year ago. This is the kind of agreements we are getting at the present time.

Mr. CURRIER. No suggestion of that kind was made in June, at the hearing then, that there had been any change in the contracts.

Mr. TINDALE. No; because we considered it purely a personal matter. I am going somewhat out of my province in speaking of it here. This is merely a personal contract between us as publishers and the composers. I am merely telling you that, because there can not exist any such grand monopoly as you will be asked to believe does exist.

Senator SMOOT. From your speech have we not the right to construe your remarks to mean that the composer has that right?

Mr. TINDALE. Yes. He has that right. He can give it to us if he wants to.

Senator SMOOT. And he can give it to the Æolian Company or any other company he may desire to give it to?

Mr. TINDALE. Yes.

Mr. CURRIER. And the Æolian Company now, instead of making contracts with the publishers, will seek to make contracts with the composers?

Mr. TINDALE. Yes. In other words, this is a new form of property that the composer has found, which has dropped into his lap, and that he reserves to himself.

Mr. CHANEY. The composer is now looking after his interests a little bit better.

Mr. SOUSA. I could make a contract with a talking-machine company or any other publishing house.

Mr. CURRIER. Haven't you made any such contract?

Mr. SOUSA. I have not yet, but I will.

Mr. HINSHAW. What would be the probable increase in the price to the consumer or the user for these perforated rolls if this law should be passed?

Mr. TINDALE. There is said to be an immense profit in the manufacture of these rolls and disks, and the small pittance that they would be called upon to allow the composer would not affect those rolls one cent, in my opinion.

Senator SMOOT. They would probably be sold to the public at the same price they are now?

Mr. VICTOR HERBERT. I will say, Mr. Chairman and the members of the committee, that I have not any contract with any company. I would simply give my works to the best company, and some of my works I would not give out at all. If I wrote a little piece for a friend, I would not give it to anybody. We only hope that we will have a voice in having these arrangements made, if they should be made.

The CHAIRMAN. The committee will be in recess until Monday morning at 11 o'clock.

MONDAY, *December 10, 1906.*

The joint committee met at 10 o'clock a. m., pursuant to adjournment.

#### STATEMENT OF MR. J. F. BOWERS.

Mr. BOWERS. As one of the proponents of the bill, Mr. Chairman, I wish to say that the bill as it stands is satisfactory to the Music Publishers' Association. So much has been said on this subject by the gentlemen who have preceded me that I will not take up your time by going into it at any length. There are, however, one or two little matters about which I should like, if possible, to enlighten the committee, at least putting our view of the question before you, and that is as to the relations of the Æolian Company of New York to this measure. I am not a member of the Æolian Company, nor do I speak for it specifically or directly. But I want to say, in connection with this measure, that the opponents of paragraph g have dwelt with considerable emphasis and force on the fact that this is a bill designed in the interest of a monopoly, that monopoly being the Æolian Company of New York.

The Æolian Company, as the Chair may not know, are manufacturers of mechanical instruments using principally perforated rolls for piano playing. A few years ago—ten or twelve years ago, perhaps—as the Chair may recollect, there was presented to the House a copyright measure known as the Troller bill, framed by Congressman Troller, of Missouri, in answer to the request of the music publishers, and dealt principally with the question of infringement of copyright by the makers of mechanical instruments. That bill failed of passage.

A few years after that the Æolian Company, by its representatives, conferred at a meeting of the Publishers' Association and stated that they were aware that they had been unfairly using the copyrights of members of the association and wanted to pay for that use, provided they were secured some protection. It was not thought well at that time to enter into any arrangement, and the matter dropped.

In 1902 the Æolian Company again brought up the proposition, agreeing that in consideration of testing the existing copyright act

in the interest of the publishers and at their expense they would prosecute cases through the lower courts, and the Supreme Court of the United States if necessary, to obtain a final ruling on the existing copyright act. They agreed with a number of the publishers that in consideration of putting this case through the publishers were to give them the use of copyright publications for a certain number of years.

Mr. CURRIER. Did not the contracts that you speak of also provide for an attempt to secure legislation by Congress?

Mr. BOWERS. No, sir.

Mr. CURRIER. I had an impression that they did.

Mr. BOWERS. No, sir.

The contracts were signed by several music publishers as individuals, the association at that time not being incorporated, with the distinct understanding that if the case failed in the court of last resort the contracts should fall by their own weight.

The Æolian company is not interested in any way, shape, or manner in this bill. It has no interest whatever in it. It takes no interest in it. It sent no representatives to the conference, nor has it anybody here.

A monopoly of publications is an impossibility, and all this talk of a monopoly of music publishing is unwise, because the authors are fighting against the publishers almost every day. There have come into the field, since the signing of that contract, quite a number of publishers who had nothing to do with the contract. There are also outside contract arrangements with a number of other publishers of music, such as the Church company and companies in Philadelphia, Milwaukee, and so on. As I have said, the contracts are individual contracts and depend entirely on the contention raised by the publishers being sustained in the Supreme Court of the United States.

A MEMBER. Where is that case now pending?

Mr. BOWERS. I will say that the circuit court of appeals sustained the lower court, and it is in the Supreme Court now on appeal.

We are here asking for what we consider to be our rights and to be fair to all concerned. We do not want you to be mislead by this talk of monopoly, nor do we think you ought to be influenced in any shape or manner by the trade papers' and others attacks made on the Librarian of Congress. We have found the Librarian of Congress to be not only a most kindly and courteous gentleman, but we think one of the most splendid servants in public employment. We simply want to submit this matter to you for your consideration, without taking any more of your time or dwelling at greater length upon the subject, simply assuring you that there is nothing whatever in this talk of monopoly, which we certainly think does not exist.

Mr. WEBB. I wish you would tell us what the Music Publishers' Association is, and of how many members it is composed?

Mr. BOWERS. That is a voluntary organization made up of about 58 different publishers. I should have said that there are about 75 contracts in existence at the present time affecting about 500 publishers.

Senator SMOOT. You speak of it not being possible to create a monopoly. Is it not possible to create a monopoly so far as the popular authors are concerned?

Mr. BOWERS. I do not see how that can be the case.



Senator SMOOT. There are monopolies in the case of books.

Mr. SOUSA. You can no more restrict composition than you can the output of babies.

Mr. BOWERS. That is about so. My recollection is that the courts held some years ago that a roll was not a writing.

Mr. JOHNSON. That it was not sheet music within the meaning of the present copyright law.

Mr. O'CONNELL. Do you agree with the letter of Mr. Burkan when he says that all the music publishers of any consequence in the United States with the exception of two are members of the association?

Mr. BOWERS. No, sir; I do not, because it is not so.

Mr. O'CONNELL. And that one of those two had since come in?

Mr. BOWERS. I mentioned the four or five houses who are not members of the association.

Mr. O'CONNELL. I will ask you also if the firm of Lyon & Healy, of Chicago, with which you are connected, and which is the largest distributor of musical instruments in the West, are not the western distributors of the Æolian Company?

Mr. BOWERS. We are Chicago distributors only.

Mr. P. H. CROMELIN. May I ask Mr. Bowers whether Lyon & Healy are not the western distributors for the Victor talking machine?

Mr. BOWERS. We are only one of a number of distributors; there are perhaps six houses in Chicago handling that machine.

Mr. CURRIER. Do you object to the provision in the bill for the payment of royalty, or to the amendment offered here on Saturday by the representative of the Victor talking machine—a license provision?

Mr. BOWERS. I do not think I heard that on Saturday. I do not know what it was.

Mr. CURRIER. It was, in effect, a royalty.

Mr. BOWERS. A royalty to the publisher and composer?

Mr. CURRIER. Opening the reproduction of music by any mechanical means, subject to the payment of a reasonable royalty.

Mr. BOWERS. We have no objection to that.

**STATEMENT OF MR. B. F. WOOD, REPRESENTING THE B. F. WOOD COMPANY, OF BOSTON, NEW YORK, AND LONDON.**

Mr. WOOD. I want to emphasize especially the fact that I represent our London house, because the fact that we have an office in London brings me in touch with foreign publishers, and I know somewhat their side of the question. I have been traveling through Europe a good deal in the course of business nearly every year for the past fourteen years, and I know their side of the question. I have been obliged to answer to the best of my ability questions as to the defects of the present law, and I have assured them at the convention of the publishers of the world at Leipzig that I would use my best endeavors to bring about, if possible, such a condition as would give them their just dues.

Mr. CURRIER. What are they claiming that they have not now?

Mr. WOOD. This is not the subject of my text at all; I merely said that in passing. I merely say now that the foreign publishers would

be perfectly satisfied with the present bill, because they think it is a decided improvement over the old law.

Mr. CURRIER. Yes; but they will not operate under this law.

Mr. WOOD. They have a better law.

Mr. CURRIER. Do they want copyright protection against mechanical reproduction?

Mr. WOOD. I am not speaking of that. I am speaking of section g.

Senator SMOOT. Is your English firm satisfied with paragraph g of section 1 of the bill?

Mr. WOOD. Perfectly satisfied; but we do not concede that it should be possible to give the right for each manufacturer of mechanical instruments to use the property of any composer without the composer's consent even upon payment of royalty. That is one of the exclusive rights belonging to the composer, that he should have the right to decide what he wishes done with his work—to which publisher or to which manufacturer he should give the right of publication and distribution. It would be an act of injustice to put any other interpretation upon the phrase "exclusive right."

Mr. CURRIER. The composer has no rights now, and we are proposing to give him rights. Can you suggest any argument why reasonable conditions should not be attached to that gift—though perhaps I ought not to call it a gift?

Mr. WOOD. Pardon; I quite differ with you. But whether we have any rights to be protected, I think the argument of Mr. Burkan in regard to writing is just as applicable to the present law as to the proposed law, and I shall so continue to hold until the decision of the Supreme Court. One of the opponents expressed to me yesterday the very thought that to me was so pertinent and strong that I at once made a memorandum of his words, because I thought they were a very clever statement of our position: "What the publishers really want is a clearer statement of that which already belongs to them." We do not ask anything else. We only want a clearer statement of that which already belongs to us. I said, "That is the very thing. Why don't you let us have a clearer statement? We do not want anything more than has absolutely been given."

Mr. CURRIER. Then we can settle this very quickly by eliminating paragraph g.

Mr. WOOD. I am perfectly willing to have that eliminated, so far as I am concerned.

Mr. CURRIER. Are the people you represent—the music publishers—willing?

Mr. WOOD. I can not speak for all the music publishers. I am not a public speaker, and only have consented to appear here to try to convince you that it was impossible to make a combination or trust in the music business—just as impossible as can be. You can not do it. It has been said that a new publisher and composer are born every day. One gentleman has said there is no chance for a new composer. Perhaps I can refute that from my own experience. My catalogue is made up of composers unknown a few years ago, with probably a few exceptions, Mr. Chadwick among them. So my own experience at least tends to prove that it is not possible to make a combination and that no trust can interfere with my rights, but I can go ahead as I choose.

Mr. CROMELIN. May I ask Mr. Wood a question? Mr. Bowers, a member of the firm of Lyon & Healey, has just made the statement that he does not appear as the representative of the Æolian company. I would like to ask you whether he did not approach you—not once, but half a dozen times—and beseech and endeavor to get your firm to sign this contract? You told me so yesterday.

Mr. WOOD. That is perfectly true, if I may explain.

Mr. CURRIER. You have the right to explain.

Mr. WOOD. The explanation is this: As I understood it, the idea at the foundation of that contract was that we should render mutual assistance to carry out our purposes and protect our rights. They were anxious for me to come into it, supposing that I might have some influence. But there never was any suggestion in my mind that we had formed a combination. I have talked with other publishers, and talked with one of the largest publishers at this hearing recently, and he was surprised at the suggestion that we had formed a combination. That never was in mind at all.

Mr. CROMELIN. May I ask Mr. Wood another question, as he is thoroughly informed on this subject? He tells us he has made trips to Europe every year for several years. May I ask whether the English Publishers' Association have any relations with the American association, and whether or not Ricordi & Co., of Milan, Italy, the largest publishing house there, have any relations with the American association? Mr. Ricordi told me he was a member of the association. That is why I am asking.

A GENTLEMAN. He is not a member.

Mr. WOOD. May I answer?

Mr. CURRIER. I do not think you need to go into that. We do not care about that.

#### STATEMENT OF MR. GEORGE W. FURNISS.

Mr. CURRIER. Please state whom you represent.

Mr. FURNISS. I am the special committee on copyright of the Music Publishers' Association of the United States. I am personally connected with Charles H. Ditson & Co., of New York; J. E. Ditson & Co., of Philadelphia, and the Oliver Ditson Company, of Boston. The Ditsons are music publishers and probably one of the oldest houses in America.

We are associated, Mr. Chairman and gentlemen, with fifty-two or fifty-three other publishing houses located in various parts of the United States—Boston, Philadelphia, Brooklyn, New York, Chicago, St. Louis, etc. They occupy various classes of publishing. Some publish the light, popular music of the day, but only a few of them. Others publish extremely classical music and standard music. Others make a specialty of band and orchestra music, and others publish music for small instruments—the violin, guitar, mandolin, club arrangements, etc. We are not all in the same class, but we are all music publishers. The house I represent does not aim to publish the popular music of the day. We keep out of that altogether. That is done by other houses.

We took an active part in the conferences called for the purpose of furnishing suggestions in regard to framing and obtaining the

passage of a bill, and we have been sincere all through these transactions, Mr. Chairman and gentlemen. We have for the past twenty-three years gone through all sorts of battles with pirates. For a number of years we fought Canadian pirates who were reprinting our music and selling it at very low prices, not only in Canada but on this side of the line. We got something out of them, but hardly enough to satisfy the royalties of our authors. They had agents going through the country and sent out circulars and did a great deal of advertising. At times the size of their payments to us amounted to \$3,500 for matter sold on this side. During those years we were greatly harassed to know what to do for relief. We besought the State Department, and were referred to the Universal Postal Department, and we were again sent before the committee considering a new tariff. We were really kicked all over Washington many and many a time, until we finally discovered that under the present copyright law the Secretary of the Treasury and Postmaster-General had the power to make such rules and regulations as would prohibit the importation of these goods. We got the representatives of the Departments together, and Mr. Montgomery knows the battle we fought, and we thank him kindly for the assistance he gave us two years ago. The matter was brought to the attention of the Assistant Attorney-General for the Post-Office Department and the Customs Department of the Treasury, and a joint compilation of regulations was made up to protect us, giving us the right to seize that contraband music and destroy it. Before that we had to resort to some sort of seizure, but it was very expensive in practice; for instance, we could not seize an accumulated lot of music that had been taken to the dead-letter office in the course of weeks and months, but we would have to get confiscated each little shipment of music of one piece or half a dozen. Those joint regulations protected us in that, so that I am happy to say to-day that the Canadian pirate is almost out of business. But they were not all Canadians in that fight; there were some Americans interested.

You can see the advantage they had at first in making perforated music sheets and in publishing the music itself. In publishing music it is well known that only about twenty pieces out of a hundred pay the expense of production—the making of the plates and putting them on the market. Very few out of each hundred pieces are successful and remunerative. That business is probably no more successful than is the average business man, and you know very few business men are successful. So all pieces of music are not successful. These pirates simply took the best work of American brains, and they had no expense in the way of compensating the authors, whereas our publishers could not do business in that way. The Canadian people had no expense of advertising, but publishers on this side expended large sums in that way. Sousa's band would probably require a considerable sum to play only one night in a large town. A prominent stage singer would require also a large amount. Those of us who advertise in the newspapers expend large sums of money in that way. My firm averages at least \$50,000 a year in advertising in different ways, by circulars and in the newspapers. We think we ought to have all possible protection from these Canadian pirates, to prevent them from taking the cream of our business.

Mr. CURRIER. That has all been taken care of in the bill.

Mr. FURNISS. Yes; I understand that. At that time the publishers, in their desire to get some protection against mechanical players, were glad to see some way of getting assistance from some, if not all, of the members of the music association, and so we made a contract with the Æolian people, with a proviso that if the law did protect us we would get a royalty. These other men kept away from us. We would have been glad to make the same contract with them, however.

Now, we are satisfied with this new bill, as proposed to be corrected by Mr. Steuart the other day in regard to paragraph g. We are perfectly aware that the present wording of paragraph g is to be canceled, and the wording he has suggested is to be put into paragraph f of section 1. We were anxious for all the protection we could get. We are not lawyers, and all we had in mind really was to seize the thing itself, the roll, or the record, or whatever it may be called, and the mother record—the first one from which duplicates are to be made. That is all we had in view. We did not want everything in sight.

It has been suggested that the music publishers ought to get in line and make a compromise with our opponents in regard to paragraph g. We do not see how we can do that. The compromise is explicit that we shall give them a perfect right to take all the copyrighted music and reproduce it, provided they pay the royalty that may be specified by this committee or the royalty that the author himself may be satisfied with. We do not see how we can consent to an agreement of that kind. The subsisting copyrights will not be continued by the new bill. We have no property rights except the pieces we publish to-day. We do not know whether the authors will give us the right of publication under this new bill. As we understand it, the author will come out a free man, at liberty to make such new contracts as he chooses, entitled to all the protection and property rights given him by the bill. We may get the pound of flesh, but the author can not give to these men one drop of blood. How can we go to work and consent to something being embodied in this new bill in which we have no rights, and in which the author has the right to sell as he chooses?

Senator SMOOT. Why can he not sell to anybody?

Mr. FURNISS. Under the present law?

Senator SMOOT. No; the previous law.

Mr. FURNISS. I do not see how the author will be able to sell to anybody and everybody. There is no provision of that kind.

Senator SMOOT. Do you object to him selling to everybody?

Mr. FURNISS. We have no objection to the author dealing with whom he chooses. He wants to be a free man so as to be able to make contracts with anybody. Take, for instance, the piano manufacturers. We are probably the greatest manufacturers of pianos in the world, but not a single publication of music. The firms who make mandolins, guitars, and such small instruments do not publish music for those instruments. Take those people who manufacture orchestral and band instruments; of those firms I think only Lyon & Healy publish any, and they publish comparatively few pieces. The publishing has always been separate from instrument making.

The suggestion has been made in my hearing that a factory for the making of these disks might be established in every large city in the country, where the author could go and have his record made. But what will those manufacturers say? That they can not make these things. It is false. Mr. Sousa's marches will not be kept off the market. Those concerns may not manufacture, but Sousa's marches will be manufactured by somebody, and you do not care who manufactures them so long as the people can get what they want. You are not taking away any property rights from these gentlemen.

Mr. Chairman, I am sorry to dwell on a point I am now about to suggest, and I do not know why I should except for the fact that it has been a subject of so much thought by us in the last twenty-three years that it is a little difficult to steer clear of it. Our opponents have said all manner of unkind things about us in speeches and in the public press; have made all sorts of accusations against us. They call us a trust. I say there is no such thing as a trust in music publishing. Our association of 52 members have never yet discussed the question of any combination in the selling of goods. We allow the members to sell at any price they choose, or to give them away if they want to. There can not be any trust unless there is a combination to control prices. If I have not given the right definition of trust, then I confess I am at sea in my talk. But we certainly can not see where we are a trust. They have even charged that the Librarian of Congress has been too familiar with our music.

Mr. CURRIER. I do not think you need to go into that.

Mr. FURNISS. I want to say that the music publishers last year entered about 26,224 copyrights and the year before they entered over 24,000 copyrights. Our people are not at all unknown in that department. We are known to that department personally.

Mr. CURRIER. You do not need to go into that.

A MEMBER. What are the objects and purposes of your association?

Mr. FURNISS. We are a branch of the old association known as the Music Board of Trade. Under that organization the old music firms of the country were united to protect themselves in regard to prices. They regulated the prices at which music should be sold. They said to the dealer, "You must buy \$300 worth or you are not a dealer." That was under the old association. Time elapsed and that was cast away. New men came in and some of the old retired, so that we now call our association the Music Publishers' Association of the United States. The only thing we have had to do has been to fight piracy and try to get protection against it. When that is accomplished I do not see what else we can do to keep our association alive. There will be nothing else left.

We have been told by the opposition that we are the most iniquitous trust the Lord ever produced; that we are international as well as national. How can we be international, aside from the point that we have copyrights in foreign countries? The United States has a copyright treaty with England as well as with Germany and France. Of course we are interested in foreign copyright legislation. We have in our association to-day, I think, four English publishers who have come to this country, and we are welcoming them. We have

no objection to their seeking to get a portion of the trade of this country. Mr. Ricordi, whose name has been mentioned, is one of those gentlemen who applied for membership. They can all come in and welcome.

I do not think I ought to take any more of your time. I have a little sketch here that I intended to give you, and if you will give me permission I would like to file it.

[The Music Trades, December 1, 1906.]

**COPYRIGHT FROM PUBLISHERS' STANDPOINT ESSENTIAL TO THE DEVELOPMENT OF THE USEFUL ARTS—MELODY THE CREATION OF GENIUS—PROPERTY RIGHTS INHERENT.**

[Specially written for the 1906 Christmas issue of The Music Trades, by George W. Furniss, Boston.]

The word "copyright," from the standpoint of the publisher, is of itself sufficiently explanatory. To the author or his representative (usually the publisher), "copyright" means the exclusive right to multiply copies and vend the same.

The publisher, by agreement or by contract, becomes the financial backer of the author, and the author looks to him by habit or custom to protect the property rights of the work, and this is done at the publisher's expense. The publisher represents the market where the author can go and sell his work, either in whole or in part, and reserve such property rights as he may choose.

When the copyright laws are not sufficiently plain or strong enough to protect the author or his assigns it is the custom to ask Congress for additional legislation on the subject. The copyright laws require the publisher to print on each copy of the composition the word "copyright." This is a notice to the public that the work is the property of somebody, and it gives them further instruction to "keep off," which means that certain property rights are reserved. When the composition is sold the copyright does not go with it. That is held by the owner of the copyright. The material thing is what is sold, which becomes the property of the purchaser, and he can use it when he chooses, but has no right to multiply copies in any form. He can teach it to others, but all rights that have any property value remain the rights of the copyright owner.

**COPYRIGHT AN INCENTIVE TO DEVELOP USEFUL ARTS.**

Copyright is the keynote to the protection of the "useful arts." If there were no protection there could be no property rights, and therefore little incentive to develop the "useful arts." Men and women would not go through the drudgery and the expenditure of time and money to acquire proficiency in the profession unless there was some reward to be obtained. Do you desire to have your children learn a trade or a profession where there is no remuneration?

It was a wise and generous thing when the framers of the Constitution of the United States remembered the author and inventor. The world has been benefited by it and our country glorified. If the Constitution had made no mention of the author there would have been no need of the word "copyright." It is not the work of the author, nor the publishing of it, that has caused so much trouble and talk on the copyright question. It is the willful counterfeiting—infringing and reproducing without permission—that has made the trouble, with more loss, trouble, and expense to the publisher than the public could possibly imagine. Because of the reproducing and appropriating without permission the publishers are asking for additional protection; they claim the Constitution gives to the author the exclusive rights, and this is promised him by the Constitution, as follows:

"The Congress shall have power to promote the progress of science and 'useful arts' by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries."

The meaning of the word "writings," as employed in the Constitution, has been expressly defined to include all forms in writing, printing, engraving, etching, photographing, paintings, statuary, etc., by which the ideas in the mind of the author are given visible expression. On the word "writings" there will be a battle fought in Congress by some of those opposed to the new copyright bill,

viz, perforated music roll and talking-machine-music sound-record manufacturers. They promise to "lock horns" with the author and make him understand that an exact copy of a musical composition when copied by them and made into a perforated music roll and talking-machine record and sold under the title of the musical composition containing an accurate record of its melody and harmony, is not a copy of the composition from the fact that it does not look like the printed copy and can not be read by the musical public. More argument has been made upon the subject of copyright than anything I know. The most able legal minds have been called upon to defend and explain its meanings. They say that the composition of a new air or melody is entitled to protection, and the appropriation of the whole or of any substantial part without permission is a piracy; that the author should be entitled to the full amount of profit which he can derive from his own creation, and the product of his brains should be his for all purposes.

#### AN ORIGINAL AIR THE PRODUCT OF GENIUS.

It is the air, or melody, which is the invention of the author. Piracy depends upon whether the air taken is substantially the same as the original. The most unlearned can distinguish one song from another, but the mere adaptation of the melody by changing it to another musical form, or transforming it from one instrument to another, does not even to common apprehension alter the original subject. The air tells you it is the same. The original air requires the aid of genius for its construction, but a mere mechanic in music can make an arrangement.

Literary property is not in the material which preserves the author's reproduction, or in the means of its communication to others, but in the intellectual creation which is composed of ideas, conceptions, sentiments, and thoughts. It is in what is conveyed by the meaning of the manuscript, or the printed page, and not in the paper or material. It is an invisible, intangible creation of the mind fixed in form and communicated to others. It has been maintained that material substance is an essential attribute of property; that nothing can be the subject of ownership which is not corporeal. It is clear that a thing must be capable of identification in order to be the subject of exclusive ownership, but when its identity can be determined so that individual ownership may be asserted, it matters not whether it be corporeal or incorporeal. The spirit of both natural and of artificial law is to assign an owner to everything capable of ownership.

#### PROPERTY RIGHTS INHERENT IN AN INTELLECTUAL CREATION.

There can be, then, no property in a production of the mind unless it is expressed in a different order of words, but the property is not in the mere words alone—not alone in the one form of expression chosen by the author—it is in the intellectual creation, which language is merely a means of expressing and communicating. The words of a literary composition may be changed by substituting others of synonymous meaning, but the intellectual creation will remain substantially the same. This truth is judicially recognized in the established principles when the property of the author is violated by any unauthorized use of his composition.

The test of piracy is not whether the identical language is used, but whether the substance of the production is unlawfully appropriated. An intellectual production may be expressed in any number of different languages, the thing itself is always the same, only the means of communication is different. The plot, the character, the sentiments, and the thoughts which constitute a work of fiction form an incorporeal creation, which may be communicated by a hundred different tongues—by the labial, or the sign of the mute, the raised letters of the blind, or the comprehensive characters of stenography. The means of communication are manifold, but the invisible, intangible, incorporeal creation of the author's brain never loses its identity. The Bible has been translated into all tongues, but its truth, its eloquence, and its poetry have been the same to all nations.

The true test is not whether the thing is corporeal or incorporeal, nor yet whether it is attached to a material substance, but whether it is capable of identification so that exclusive ownership may be asserted. The identity of an intellectual production is secured by the language in which it is inscribed, and that is true whether the language be spoken or written. When a composition has not been reduced to writing it may be more difficult, and in some cases



impossible, to prove the authorship and thereby to establish a title to ownership. The manuscript is a means of the proof only—it is immaterial whether the composition has been written or communicated in spoken words.

The identity of a literary composition consists entirely in the sentiments and the language; the same conceptions clothed in the same thoughts must necessarily be the same composition; and whatever method be taken of exhibiting that composition to the ear or the eye of another by recital, by writing, or by printing it is always the identical work of the author.

#### PUBLISHERS' CLAIMS CONCEDED BY SOME MANUFACTURERS.

Some of the perforated music roll and talking-machine music record manufacturers acknowledge that the author of the musical work should receive some reasonable remuneration. They say that their business could well afford it, but why should they pay a royalty to the author or owner of the copyright unless the other manufacturers would do the same? The perforated music rolls retail from 50 cents to several dollars each; the talking-machine records retail from 35 cents to \$5 each. However, it is a fact that in some compositions the sale of the sound record is far greater than the original copy in printed form.

It is claimed that people do not buy these music rolls and music records to read as musicians do the printed copy. Did you ever hear of a musician purchasing a copy of a musical work simply to read it as you would a book or a story? In the more intricate piano compositions and orchestrations it is hardly possible that a musician could enjoy its harmony and instrumentation by attempting to read it by sight. It is used as a guide to a musician, a guide to the eye which notifies the fingers of the performer the exact keys or strings of the instrument to strike. A perforated music roll is used as a guide to the mechanical part of the instrument to liberate certain valves and cause the strings or reeds to sound forth. The roll is not a part of the instrument; it is detachable and sold separately. You can buy one instrument (piano or organ) and then buy 10,000 music rolls to be used in the reproduction of the musical compositions.

Some of the talking-machine manufacturers talk and advertise in this manner: "Let us look at the talking machine from the scientific and musically artistic side—a little instrument which can reproduce the music of the voice or of any orchestra or a band of a hundred or more pieces. The little needle, the sound box, and the record are hardly less wonderful in their united powers than the human mind—the ear and voice. Still more wonderful in some respects is the sound box, a mechanical ear which hears the vibrations of the needle on the record and transmits them. The delicate original disk is first used as a matrix, the mother of thousands of records so exactly alike that no expert can tell the difference between them. You can have your voice photographed and keep it on a record as a blessing to future posterity. The records are carefully protected and put away in the vault of sound writings."

I heard the talking machine play the record of the departure of a British man-of-war. Command was given for all to get on board. You could hear the fife and drum band marching nearer and nearer with the marines, and the rattling of their accouterments; the jolly of the crowd on the embankment and its growth as the voices increased in multitude. The vessel started—you could hear the steam and the working of the engines. The band played "God Save the King," and its faint strains were heard as the vessel passed seemingly out of sight.

What notation could represent a copy of this sound scene? You say there is none in existence. What, then, is the explanation? We say simply a sound writing or a sound photograph.

If the photographer with his moving scene camera had taken the photograph of the scene as it appeared to the eye—and the talking-machine record the sound as it appeared to the ear—in the same tempo, and then both reproduced the same at one time, you would have a perfect photograph both of the scene and of the sound. In fact, a perfect picture of the event.

#### WHAT CONSTITUTES A COPY.

There will be a battle also on the word "copy." To the author it means that which appeals to the ear and not to the eye. You can not see a musical sound wave, but you can hear it. A blind person with good hearing can enjoy a

musical composition, its melody and harmony, just as well as a person with two eyes. A deaf person with good eye sight can not see a musical sound wave, nor enjoy its beauty.

A Boston newspaper man recently hooted at the idea of copyrighting "sound waves." He claimed that it was something that belonged to nature and to God and free to all men, but did not know that music was nothing else than sound waves, and that the artist or photographer could make a copy of the sun, moon, stars, and all that is on earth and beneath the earth and secure copyright on the same.

#### A QUESTION OF PROPERTY RIGHTS AND PROTECTION.

Should Congress force the author to give his composition to the world, or give more than the author desires? If he wishes to hold the composition to his own personal use, that is a matter within himself. If he wishes to hold the right of public performance, he can do so. Or if he wishes to place it on the open market, it then becomes to him simply a question of business.

The question is asked, "How far will Congress go in giving us protection, and what will be the true wording of the misdemeanor clause in the bill now before Congress?" The British copyright law reads, as follows:

"Every person who prints, reproduces or sells, or exposes, offers, or has in his possession for sale, any pirated copies of any musical work, or has in his possession any plates for the purpose of printing or reproducing pirated copies of any musical work, shall be guilty of an offense, and shall be liable to a fine, and on a second or subsequent conviction to imprisonment with, or without, hard labor.

"The court may grant a search warrant authorizing the constable named therein to enter the premises between the hours of six of the clock in the morning and nine of the clock in the evening, and, if necessary, to use force for making such entry, whether by breaking open doors or otherwise, and to seize any copies of any musical work or any plates in respect of which he has reasonable ground for suspecting that an offense against this act is being committed."

Our copyright laws will not be perfect or up to date until Congress shall follow the instructions given it by the Constitution and provide ample protection for all commercial use of the author's work.

This subject resolves itself simply to the question of property rights and its protection.

And on that line the members of the Music Publishers' Association of the United States propose to fight for the authors whom they represent and themselves until their rights are fully established beyond question or cavil.

GEORGE W. FURNISS,  
*Special Committee on Copyright of the Music  
Publishers' Association of the United States.*

BOSTON, MASS., November 17, 1906.

A MEMBER. You admit that when your association was first organized it was a trust in form?

Mr. FURNISS. It was composed of the various music boards of trade, who cooperated for their mutual benefit in the matter of prices.

Mr. O'CONNELL. Is it not a fact that the average prices of copyrighted sheet music are about one and a half times the prices of non-copyrighted sheet music?

Mr. FURNISS. The average royalty to Mr. Sousa is 15 per cent of the price called the published price. For instance, if 60 cents is the published price, 15 per cent of that is allowed to Mr. Sousa.

Mr. O'CONNELL. You have not answered my question about the average.

Mr. FURNISS. Are you alluding to copyrighted music or noncopyrighted?

Mr. O'CONNELL. You certainly do not pay royalties on noncopyrighted music?

Mr. FURNISS. Certainly not.

Mr. O'CONNELL. Then you understand the question.

Mr. FURNISS. The average royalty paid by the publishers runs not less than 10 per cent and not more than 15 per cent on the printed prices, the printed price being double the retail price to-day.

Mr. CURRIER. Then 10 per cent—what you get—means really 20 per cent?

Mr. FURNISS. Yes, sir; we are paying authors 20 per cent, and 30 per cent to some of them.

Senator SMOOT. What is the object of that?

Mr. FURNISS. That is another thing that was brought over from the old association. They had some listed at 10 cents a page, two pages 20 cents, and so on, so that you could tell the price by the number of pages. Then improvements in printing and reproducing came into existence, so that sheet music can now be produced much cheaper than by the old hand process of printing. I am not a printer, but we can now print music for much less cost than ever before. Then, of course, competition came in, and publishers found they could select people. It was these things that produced the abandonment of the old association. Previous to that time it was practically iron-clad, with the exception of a few houses on the outside.

Mr. CROMELIN. As I came down Pennsylvania avenue this morning to attend this hearing I passed the house of Droop & Sons, a large music house here, and noticed this sign in the window, spread across the whole window: "John Philip Sousa's new march, Free Lance, 60 cents, reduced to 17 cents."

Mr. FURNISS. Mr. Sousa gets his royalty just the same.

Mr. CROMELIN. I would like to ask whether you mean that Mr. Sousa still gets 15 per cent upon 60 cents or 15 per cent upon 17 cents, where the price is reduced in that way.

Mr. CURRIER. Mr. Sousa can answer that.

Mr. SOUSA. Mr. Chairman, composers are very careful not to allow themselves to suffer by reason of the competition of publishers. Indeed, in my terms, both for the stage and for the publisher, I make my percentage on the gross receipts. In regard to stage rights, the managers get so much for their share for everything put on the stage, but I get my 15 per cent. In this very march there are 16 different arrangements made on the title-page, but I get my 15 per cent of the gross receipts, I don't care what it sells for.

Mr. CURRIER. That answers the question.

Mr. FURNISS. No matter whether the publisher gives it away, Mr. Sousa gets his royalty.

I would like to make one more point. I have in my hand a circular, which possibly inadvertently came to me, sent out by the American Musical Copyright League, organized by the gentleman who is the editor of a paper presented to you the other day—a good man, a good editor. Perhaps no better music paper could be made, unless Mr. Hearst made one. These people say they are organized to protect the American public. We publishers had the idea that Congress was the protector of the American public. I would like to put this circular in evidence with my statement in connection with other points they make in regard to their organization and the prices they charge.

Mr. WEBB. How many reputable music houses in the United States are there in your organization?

Mr. FURNISS. We were talking to-day, Mr. Webb, in regard to the popularity of music. Sometimes a firm has a greater success with one piece than another house with 500 pieces. There may be 10,000 small fellows on the outside. I guess you will find a publishing house in almost every large town in America. But so far as large houses are concerned, those who publish the standard music of the day from the outside of our association, there are not more than two or three.

Mr. WEBB. That answers my question.

Mr. CURRIER. This circular you offer does not seem to be of practical value for discussion. What is the purpose of putting it in the record? You must remember that the members of the committee will have to read the record.

Mr. FURNISS. I withdraw it upon that suggestion.

I thank you, Mr. Chairman and gentlemen.

Mr. CROMELIN. May I ask Mr. Furniss one more question for information?

Mr. CURRIER. Yes.

Mr. CROMELIN. In the Music Trades of December 1 you have an article on copyrights. You are the special copyright committee of the Music Publishers' Association. You have just handed this article to the committee and asked to have it filed. May I ask whether or not, in quoting the British copyright act of 1906, you have not purposely omitted the most important part of the bill, which states that the words "pirates" and "pirated copies" shall not be construed to cover perforated rolls or the records used in talking machines? I have read this article with much interest, because you are the special committee on copyright.

Mr. CURRIER. Suppose you put in the portion which you say has been omitted.

A MEMBER. The whole English act is already in the record.

The LIBRARIAN. The only other two names of gentlemen whose statements would be grouped with the proponents are Mr. Pettit and Mr. Bowker. I do not see Mr. Pettit here, but Mr. Bowker is here.

#### STATEMENT OF MR. RICHARD R. BOWKER.

Mr. CURRIER. How much time do you wish, Mr. Bowker.

Mr. BOWKER. Perhaps twenty minutes.

Perhaps I should say that, in speaking on a mechanical question, although I represent the Authors' Copyright League as a writer, I can speak with some knowledge in regard to the mechanical question, since I hold patents as well as copyrights and happen to be the author of a book on copyrights. I was also actively allied with the Edison Illuminating Company in New York for nine years.

Perhaps you would like to have for the record this opinion of Judge Lacombe and his associates, which has been so often referred to, in the Auto-Music case. I do not present it as part of my remarks.

The LIBRARIAN. It is already embodied in the June hearing. ["Arguments," p. 35.]

Mr. BOWKER. Doctor Hale alluded to the difficulty which came from the statute of Anne as taking away some of the rights of authors under the common law. To hark back to the fundamental part of the bill, I call your attention to the fact that section 2, as the

negative fundamental provision, has been left unchallenged by everyone, I think, except Mr. Porterfield, who confused it with section 21, which prevents any present existing common-law rights being taken away, as they were by the statute of Anne.

In that connection I want to call attention to the language of the Constitution, which does not propose that rights shall be created, but says that Congress "shall have the power to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The exclusive right in anything is, of course, a monopoly. Herbert Spencer, in talking about copyright before a committee of the House of Lords, said: "If I am a monopolist, you are a monopolist, and so is every man. If I am not entitled to the product of my brain, you are not entitled to the product of your hands. No one can own anything, and property is robbery."

That is the general position of authors, including music composers, that it is for Congress to secure to them exclusive rights. A landowner has the exclusive right not only to sell his property, but to lease it or to grant an easement. He may sell it outright, or he may sell it with some restriction, such as that no stable shall be built thereon, or that no building shall be erected thereon to cost less than a specified sum. The authors ask that their exclusive right shall be recognized in the same way. That is the meaning of the broad provision in paragraph b, and it is not intended to go further than to protect the general rights. It was not intended to follow a chattel after it has left the hands of the owner.

Under that general plan a royalty is not a protection of the exclusive right of the composer. Whatever arrangements may be made or whatever discussion there may be as to monopolies and royalties as between publisher and manufacturer of these rolls, that is not a question for Congress. Those are trade matters. Here is the question of securing rights to a man who has created property. That is the pith of the whole matter.

I pointed out the other day how closely a phonograph followed the ordinary lines, but I did not point out to you an important fact, that the phonograph, as a mechanism, is actuated by the motor only in revolving it; that the actual writing is done by the voice. It used to be said that a man can talk a hole through a barn door, and the man's voice does cut a record upon the phonographic disk or cylinder. But that record is not legible to the eye. There is also another invention, to which I referred on Saturday, the new telegraphone, in which the author's voice produces some unknown kind of impression in the magnetized particles of a steel tape. But that is definitely a writing or a record, though it is not legible to the eye. It does not matter whether these reproductions are writings or not. Necessarily they are not the originals, and it does not matter whether they are legible or not. There are manuscripts in existence where the actual writing is not legible.

So that this whole matter has to be thought of in the fine sense of the author's exclusive right to the benefit of his original work. In other words, there is an original record, and there are copies.

There is also another class of rights which are not included in a record, and those are the rights that the author has of oral expression, by dramatization for production on the stage, together with

his right of exhibition. The publication of a record involves the dedication of the writing both in its relation to music and the drama.

There is another recent invention, known variously as a dynamophone or teleharmonicon, by Doctor Cahill, which is now operating in New York, by which a musical composition is reproduced without any record to thousands of telephone subscribers, perhaps, and I understand that in the city of Budapest one newspaper has made an arrangement by which a telephone subscriber can go to his phone and ask for the proper connection, and when it is established he can hear a newspaper read to him, and I am also informed that at certain hours of the day various books are read through it.

I want to point out that the exclusive right of the author in a literary or musical composition can be interfered with in this manner of reproduction without payment to him by the publisher of books or by the manufacturer who publishes through the talking machine. If more and more music should be produced in that shape it stands to reason that the returns to the author, instead of increasing with the development of invention and the consequent benefit to the public, will be reduced. So it is necessary that the author's exclusive rights should be protected by the broadest language.

Again, I wish to emphasize our concurrence in the suggestion that, instead of section g, the broad provision of that paragraph shall be added to paragraph f. We find also a serious defect in paragraph g where contrivances and devices are spoken of, naturally suggesting machines, which are patentable, rather than the form of intellectual productivity which is copyrightable.

Now, to come specifically to the question of autorolls, perforated rolls, there are many kinds, almost an infinite number of kinds of such rolls, and there will be more. It is not a question of whether such a record can be read. I believe it can be read, in a certain sense, because the Assyrian hieroglyph, the very progenitor, or if not the progenitor, certainly has such a strong resemblance to the record on these rolls that it may be considered to lie at the foundation of the art. But it does not matter in the slightest whether anybody can read those or not. As a matter of fact, however, they do detract from the exclusive right of the author. There can be no doubt about that. The author is entitled to the exclusive right and benefit of the intellectual creation of his brain. There can be no doubt that these music rolls would not have existed had not the author created his musical composition. That is the key to the whole situation. Whatever may be the relations between the music composer and the music publisher, or whatever may be the arrangements of the Æolian company with publishers, for one I do not believe that any of the interests—except possibly those of the music publishers in that conference—cared anything about it, but I do know that the music composer is entitled to ask from you the securing of his exclusive rights.

The decision to which I have referred says specifically that the court is of opinion that these rolls are properly within the scope of the copyright law. But the inferior court simply said that it was not in a position to make so broad a construction, that it was rather a subject for Congressional legislation. On the other hand, the Supreme Court has often taken a broader view of the power of Con-

gress than the inferior courts felt able or willing to do. It is the belief of many, and I among them, that when this issue comes before the Supreme Court it will be adjudicated in the broader light, and that it will be found that, as in the case of photographs and other things, the Supreme Court will state that in the present law there is that provision. It would, therefore, be doubly unfortunate that this new law should seem by definition to take away rights which perhaps already existed. If they did not already exist, then certainly within the phrase of the Constitution we think those exclusive rights should be secured.

A MEMBER. How long ago was it that the case went to the Supreme Court? In other words, when can you reasonably expect a decision?

Mr. BOWKER. I am not a lawyer, and can not answer.

Mr. O'CONNELL. The decision of the circuit court of appeals was handed down five days prior to the introduction of the bill in Congress—that is, on the 25th or 26th of May, 1906. I do not know whether it has been taken up on appeal or not.

A GENTLEMAN. I have been informed by the clerk of the Supreme Court that it will be reached in about a year.

Mr. BOWKER. One thing more: There is nothing in the bill which prevents the composer under his exclusive right from making an arrangement by which any manufacturer can utilize his composition, and I think possibly in this kind of business that will be to his profit. I think this bill is very explicit on this point.

The contract that has been referred to provides particularly as to existing copyrights that they shall not in any way be affected by the provisions of this bill. I should say that noncopyrighted articles can not in any indirect way be put under the protection of the new bill. It is only a new arrangement of an old thing that can be put into copyright. So that there is nothing in this bill which would seem in any way to prevent absolute freedom on the part of the composer to deal with all these gentlemen if he chooses. There is nothing unjust to them as to the existing material which they are utilizing, and so we ask that the musical composer be put on the same basis as the author of books, the author of a drama, an artist, and be given, as the Constitution says, the exclusive right to his writings.

A MEMBER. What do I understand to be exactly your desire in regard to music, the language of paragraphs g and f being "to publicly reproduce?"

The LIBRARIAN. Mr. Steuart suggested the interpolation of the words "for profit."

Mr. BOWKER. If a man bought a machine for his own purposes and pays a royalty, of course he can not be prevented from using the apparatus for his own purposes.

A MEMBER. Suppose he buys it from a phonograph company and then buys a record of Mr. Sousa's march, the "Free Lance;" would he be liable under this bill?

Mr. BOWKER. If he bought an unlawful copy, of course he could be enjoined from using it.

A MEMBER. Take any copy that a phonograph company might make.

Mr. BOWKER. Yes; that is a logical deduction; just as would be the case if he bought hats or umbrellas.

Let me add a word: I was very much impressed with the attention given by the committee to Mr. Davis in his statement as an inventor. But the plea of the inventor that he should be allowed to sell his invention under a royalty and that the composer should be prevented from getting the benefit of the product of his brain seemed to me not to be very logical. It seems to me the argument should be that the inventor himself should be the first person to join with the claim of the author.

**AMENDMENT PROPOSED BY MR. ROBERT UNDERWOOD JOHNSON.**

Mr. JOHNSON. Mr. Chairman, may I suggest an amendment, and give my reasons for its adoption?

Clause b of section 18, on page 14 of the bill, provides:

For fifty years after the date of first publication in the case of any composite or collective work, any work copyrighted by a corporate body—

This evidently is not intended for anything else, yet I am informed that nearly every magazine is owned by a corporation which should not be deprived of the full term of copyright provided in clause c. Take McClure's Magazine. Should that periodical be given a blanket copyright of only fifty years for its materials, all of which are copyrighted for the longer term of life and fifty years, each article would have to be separately copyrighted and a separate notice printed, which would be a colossal inconvenience and a substantial conflict of equities. There would, moreover, be nothing left to copyright by a general notice. In other words, the part would be greater than the whole. I therefore, on behalf of the American Copyright League, which has already discussed this matter, propose the insertion, after the words "any work copyrighted by a corporate body," of the words "not an assignee or licensee of the author or authors."

Senator CLAPP. I think perhaps, Mr. Johnson, you had better file a written slip embodying that proposed amendment.

Mr. JOHNSON. I will do that. I only wished to call it to the attention of the gentlemen who are here so that they might have notice.

Senator CLAPP. It will be more likely to receive attention if it is filed with the proposed amendments.

The LIBRARIAN. Mr. Chairman, it is suggested that this would be an appropriate time for Mr. Burton, of Chicago, to speak. He has proposed a substitute bill, the purpose of which he explained briefly on Friday last, but which he was to have an opportunity to discuss to-day in connection with these provisions. Is it your pleasure to hear him now? I understand that Mr. Sousa desires to ask a question or make some observation.

Mr. JOHN P. SOUSA. Mr. Chairman, the first patent granted on a phonograph says:

Be it known that I, Thomas A. Edison, of Menlo Park, in the county of Middlesex and State of New Jersey, have invented an improvement in phonograph or speaking machines, of which the following is a specification:

The object of this invention is to record in permanent characters the human voice and other sounds, from which characters such sounds may be reproduced and rendered audible again at a future time.

A record is an authentic memorial, and a memorial is a preservation of memory. If you can get away from a writing in that, I would like to know it.



**STATEMENT OF MR. CHARLES S. BURTON, OF CHICAGO.**

Senator CLAPP. Please state whom you represent.

Mr. BURTON. I represent the Melville Clark Piano Company, of Chicago, and also the Q. R. S. Company, of Chicago, and other parties interested in the manufacture of automatic musical instruments and appliances.

Mr. Chairman and gentlemen of the committee, preliminarily I want to say, and not entirely out of line with that which I may have subsequently to say, that I found myself in most complete concurrence with Mr. Porterfield on Saturday to the effect that he found the pending bill not one upon which the amendments which he desired to suggest could be founded; that it did not furnish a satisfactory framework for a reconstruction to embody the views of those who differed from its present make-up.

I had it in mind to suggest changes and amendments of the bill as it stands for the purpose of meeting some particular points I had in mind, representing my clients as I do, and relating especially to automatic devices. But simply to show how difficult it is to proceed along that line, I will just mention one or two of those difficulties and then drop the matter, taking up the particular point on which I wish to speak.

For example, it will be understood that clause g of section 1 we desired to have cut out. I canceled that, and then immediately found that the same virus was found in clause f, as Mr. Steuart pointed out. I rephrased that, and then found that the same difficulty might arise in clause h. I cut out clause c for what I thought sufficient reasons, and then found that that would clash with clause h of section 5, reproductions of a work of art. And so on.

It was not because the bill is not framed in a unitary manner. It is too unitary. It is completely woven part with part, so that by those who accept all its parts it will be regarded as a most excellent piece of well-joined work; but when you begin to cut out any one feature the bill bleeds at every artery; it has to be entirely reconstructed. The red thread runs through it all. Here and there it takes a different pattern, as in clause g of section 1, but it is throughout the bill.

Therefore I quite agree with Mr. Porterfield that an entirely new bill will be necessary unless you take the bill substantially as it is in all its points.

Senator CLAPP. While I myself do not very much like the idea of a time limit, yet, for the convenience of others who are to speak, I would like to have you suggest about how long a time you want.

Mr. BURTON. That depends a great deal more on what the committee wishes at this point than upon my preference. I can say a good deal in half an hour, and I can talk two hours. But I am at the disposal of the committee. I shall make a fair opening, and then I will be here to be shot at by the parties who oppose my view, and then perhaps I should desire to reply. But I shall be content, whenever the committee wishes, to call a halt, provided that since I am here to be attacked in my bill I should like to have the opportunity to reply to the criticisms that may follow if I do not anticipate them in my opening.

Mr. WALKER. Mr. Chairman, Mr. Burton has given a great deal of study to this bill and its subject-matter, and I am informed that he suggests a large number of amendments, most of them improvements. I do not approve altogether of his substitute bill, but much of it is valuable, and it all indicates a very close study of the subject. Therefore I think that the convenience of the committee would be promoted by allowing him to proceed without time limit, because I am certain he will not use his time other than usefully to the committee.

Senator CLAPP. I think we will take a recess at 1 o'clock, and shall desire just before the recess for lunch to hear one or two gentlemen who perhaps want to get away on the trains. With that limitation or understanding Mr. Burton may proceed.

The LIBRARIAN. I have had a request from Mr. Glockling to be heard just before the recess.

Senator CLAPP. The others may not feel obliged to remain unless they wish.

Mr. BURTON. I thank the committee for so much liberty. It will enable me to confine my attention to the subject and not be watching the clock.

I think it would be most convenient if the members of the committee have before them the substitute draft for reference, though they can follow it, of course, in the parallel-column matter prepared by the authors. I shall refer to our substitute draft for my own convenience.

The LIBRARIAN. Mr. Burton, allow me to remind the committee that the variances between your substitute bill and the pending bill have been drawn off and separately printed as an addendum, and copies of that separate statement are before the committee and will be available to all who desire to refer to it. Of course there are many provisions in Mr. Burton's bill identical with the pending bill.

Mr. BURTON. That reminds me, and I may as well say at this point, that I entered upon this work solely for the purpose of covering the points in which my clients are interested, and I shall not trouble the committee with any suggestions as to sections that do not touch their interest, some of which I might have found objectionable and might have agreed with the criticisms of others. But I have simply noted these changes desired by my clients, not desiring to appropriate other people's suggestions. With that understanding, I do not stand sponsor for the mere reprinted matter of this bill. I should criticise very much of it if I were to undertake that function.

There are two sections of the substitute draft that embody the gist of the departures, as I may say, from the pending bill—sections 3 and 39.

Section 3 recognizes and intends to recognize the character of authorship entitling the person to copyright as inhering in the work done—the artistic work done in producing appliances for the reproduction of speech or music—the singer who sings through the instrument to produce the graphophone roll or talking-machine disk; the artist who plays the musical instrument and in the same way causes a reproduction of the music upon a graphophone roll or disk; the artist who plays upon the piano for the purpose of securing an automatic record or perforated roll presenting the characteristics of

his work; and the artist (for he is an artist) who cuts diagrams and arranges the perforated roll, being guided by his interpretation of the music from the printed score. In all these cases there is artistic work. You will recognize easily and at once that the singer or player, whose work is done automatically in the phonograph and made to record and reproduce itself in the resulting devices, has contributed to a result entirely independent of and apart from the work of the composer. You might not recognize it unless you were familiar with the process of the arranger of the perforated roll, but it is as thoroughly and entirely the fact in the one case as in the other.

You may put a mathematician to work to cut a perforated roll, and when you see it you will recognize at once that it is not the work of a musician. The musician must be a man with a thorough appreciation of the music. Mr. Sousa will smile at my phrase—and he is at liberty to do so—but I do know from reading testimony, and I know from information given me by those who use the different rolls, that it takes a musician using a musician's skill and ability, and, besides that, using the skill and ability of an expert mechanic, to comprehend what his machine is going to do with the roll he is going to cut. He must blend his knowledge as a musician with his musical appreciation, with his knowledge of what his machine can do, and must cut his roll accordingly. It is an artistic work of a high grade, whether you look at it from the standpoint of the mechanic or of the artist.

So that in all these cases—the roll cut automatically or cut by calculation, or the disk produced by speaking or playing—in all these is the work of authorship entitling the person who has by that means produced it to copyright thereon. It is analogous to, but, in my opinion, more meritorious than the work of the photographer who poses his subject, selects his point of view, and then manipulates his instrument with skill and produces a picture. He is not thereby cutting off anybody else from posing the same subject and selecting a point of view, but he does obtain a copyright of his picture.

Three engineers undertake to make a map, each of them, of the city of Washington. They will survey the same streets. They will mark the same corners. They have identically the same distances to lay off. And each of them will make a map, and each man is entitled to a copyright upon the map he has made, not to prevent another man from making another map of the same city with the same dimensions and directions. But each man is entitled to the product of his own effort, and the work of another will only be infringement when he has taken the work of the first as a master and copied therefrom without himself making any survey.

Therefore the object of section 3 is simply to prevent piracy, which is easy as to some of these things and not impossible in any, I believe. For example, the taking of a perforated roll that the master has produced at the expense of much work and great artistic ability and putting that in a machine and making an automatic reproduction would be an infringement. To entitle one to copyright he must himself go to the expense of money and skill in preparing his own master.

This is not a fanciful protection. It is one which the makers of these devices know is actually necessary. They know that the perforated rolls which they have produced at great expense have been used as the master from which to make replicas, which, while they may be considered very good, are still inferior to the original. We think this is the place where that protection should be granted.

It has been suggested, and I think with force, that section 3 as it appears in the printed copy before you is not entirely clear as to the intent that the protection granted should be of the particular device. It has been suggested that it might be interpreted as indicating the first producer of the device. I have indicated what I think to be the proper change to be made on page 2 of the substitute draft, beginning in line 26, so that it will read:

Shall be considered the author of the specific device or appliance so produced, and the same may be copyrighted under the provisions of this act by or in the right of such author, without prejudice to the right of any other person to arrange and produce other device or appliance of the same or other sort for reproducing to the ear the same work.

I think that will make it clear.

Now let me turn to section 39, which has perhaps received the most criticism, and I am not so conceited as to assert that it is free from objection from some points of view. The general purpose of section 39 is this: To recognize the contribution which a composer makes to the profit-earning capacity of automatic devices which produce music—to recognize it, however, in such a way that it shall not be a springing out directly from the copyright or composition, but as a personal element.

In general this section provides that no person shall make such an automatic device and issue it on the market for distribution without marking thereon the name of the author or the name of the composition, or both, unless the consent of the author shall be first obtained; that, for the advantage, presumably, arising out of the reputation of the author or his work and carried by his name, the author shall be entitled to a reasonable royalty; that that royalty shall be uniform, so that any person making a like device (as a perforated roll, a talking machine disk, or telegraphophone device) will pay the same amount—not that the talking machine disk shall have the same royalty, necessarily, but that all perforated rolls shall pay the same royalty, all telegraphophone devices pay the same, and all talking machine disks shall pay the same. The reasons for this are prudential, and I will present them later.

It has been suggested that it is not clear from the whole section, as it stands in the printed draft, that this royalty should be compulsory—that is to say, that the author should not have the power to refuse to permit his music to be reproduced in this manner; that is, it was thought it might mean that you might limit royalty to two or three; that the requirement of the bill would only be that those two or three should pay the same rate, and not that any person who desired should not make the same device. I would propose, therefore, to amend section 39 so that it shall read as follows:

SEC. 39. Devices and appliances for automatic reproduction, to the ear, of speech or music shall not be held or treated as infringements of any copyright obtained under this act upon the speech or music so reproduced: *Provided, however,* That any person publishing or making in multiple, for sale, any device or

appliance for reproducing to the ear by the aid of any mechanism or automatic musical instrument any work copyrighted under this act, belonging to class 1 or class 5 of section 6 hereof, shall cause to be plainly marked on each such device or appliance and each copy thereof the name of the author of such work and the title by which the same is published, unless the consent of the author to the omission of such name or title, or both, is first obtained.

It has been suggested to me also that the section provides no means of enforcing payment of the royalty, and would therefore seem to provide that the author might do his best to get his pay in whatever direction he chooses. In view of this very just criticism I propose to add at the end of the section, following line 27, the following:

And all courts having jurisdiction to enforce the provisions of this act shall have power to enforce the payment of such royalties so fixed, by any suitable means by which the orders and decrees of courts of equity are lawfully enforceable, and in case of continued or repeated default in respect to such payment, to enjoin the person or persons chargeable with such default from further making, selling, or otherwise distributing the device or appliance in respect to which the default exists.

I think, so far as those two criticisms go, they can be answered by these amendments.

I want to say now that the criticism that has been made this morning will surely be repeated, that Congress should not have power to recognize or give to the author a right and then dictate to him what he should do with it; that if the author has a certain right as to this feature he should be at liberty to say that one person and only one shall succeed to his rights, or a part of them; that two or three may divide it among them, and it is for the court to say; that Congress has no right to dictate any requirement in that regard.

It is also suggested—and I diverge from my line to take it up—that the language of the constitutional provision indicates that such interpretation of exclusive rights, as it might be termed, was not the intention of the Constitution. This is a little divergence, but it may be pertinent here. The constitutional provision is:

The Congress shall have power to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

Now, does the word exclusive in this provision of the Constitution mean absolute, unqualified, total, unconditioned, and unconditional? And does the clause mean that Congress shall have no power in the premises except to grant such absolute, unqualified, total, and unconditional right? If so, then there never has been a valid copyright law, for Congress has never granted to any author or inventor any such absolute, unqualified, and unconditional right. It has never granted a total right. The purpose of that clause of the Constitution and of all statutes enacted under it is to encourage the author to effort in the production of that for which he may receive pecuniary reward. Congress has open to it the whole field and the whole gamut of expedients to extend this encouragement, and has given to the author the monopoly of multiplying copies of his production. Congress might have gone much further. It might have given also the monopoly of public reading, but it has never done it; it might have given the monopoly of public and private recital, but it has never done it; it might have given the monopoly of public and private teaching the contents, but it has never done it. I might go on almost indefinitely indicating the things that

Congress might have done within this power of granting exclusive rights which it has not done in any statute. Congress has not fixed the fee for filing copies and printing notices. Congress could have fixed \$50 or 50 cents as the fee. Congress could certainly have fixed an annual fee if it had chosen to do so. Congress could have excepted from that unconditional and absolute control whatever it pleased. The greater includes the less. Congress had power to grant exclusive rights. I differ with Mr. Walker in that, perhaps. But Congress never did it and never will do it.

Mr. WALKER. May I suggest that the power to grant is the power to secure.

Mr. BURTON. I want to reply to that. If I secure for my son a position in the Treasury Department, does that mean that he had it before? The word secure does not mean, to my mind, what has been suggested. It simply meant to confirm strongly. If all Congress could do was to secure the exclusive right, then anything that does not secure that right does not come within the power of Congress. But Congress has the power up to that limit. The greater includes the less. Within that limit it had power to do whatever it deemed expedient for the purpose. Congress had given to authors the right of multiplication of copies, and it might as well have reserved to them expressly in the statute as it stands the subsequent right of translation—not as within the copyright, not as going with the title, but that the author has the right of translation.

That is to say, Congress does not exhaust its power under the Constitution when it has granted the right of multiplication of copies. It may do in any other way what it sees fit to secure to the author such rights as it sees fit to secure within its just control.

Congress having secured to the author the right of multiplication of copies, the bill provides that which is the very essence of the copyright, that the composer shall have this additional encouragement to effort, this additional advantage, namely, the right to receive a royalty for the use of his product through automatic devices. It is not an incident that pertains to copyrights, to multiply copies. It is a right reserved to the author to promote additional encouragement to effort, and it remains with him.

I believe that will stand legal criticism. I am quite confident it will stand prudential criticism.

Mr. SOUSA. Do you pretend to say that Congress, having the power to make this law, can give the author less than the Constitution had the power to give to Congress?

Mr. BURTON. Congress is not compelled to go to the limit of its power.

Mr. SOUSA. I do not think it can do less than the Constitution calls for. The Constitution says exclusive right for limited time, and I do not think it is within the power of Congress to give less than the Constitution gives.

Mr. BURTON. It may go the whole distance of its power or only a part.

Mr. SOUSA. "The Congress shall have power to promote the progress of science and useful arts." I do not think it can do less than the Constitution provides. Of course, it can not do more, because laws have been set aside as having gone beyond the Constitution.

Mr. BURTON. As I say, Congress has never enacted a copyright law that was valid, if that be the case, and that principle has been sustained by the courts. I am not asking the committee to be wiser, nor do I set myself up as being wiser, than the Supreme Court on that point. It seems to me in all such matters Congress must stop short. If the Constitution not only said how far Congress might go, but how far it must go, it would only be necessary for the copyright law to adopt the phraseology of the Constitution and stop there. It was intended by the Constitution that Congress in enacting a statute should exercise discretion in view of the conditions, the expediency and fairness of what was proposed to carry out the purpose of the constitutional provision, which was to promote the progress of science and the useful arts.

I do not want to be led off or lead off into any ethical discussion, but I repudiate entirely the proposition which has been advanced, and upon which some argument is founded, that this right of protection for authors' works is an elemental, an essential, right. I am prepared to argue the ethical question in any proper forum, but I do not believe there is any such ethical question involved, and if there be, this is not the place to discuss it. The Constitution in this provision does not proceed upon any such theory. It proceeds on the ground of expediency. The power given to Congress is the power to promote the public good; to secure fairness. Beside the duty it owes to the public, it owes the duty of securing a reward to the author to stimulate him to effort.

Expression is written in the human constitution. It does not require any National Constitution. That which a man conceives and thinks he wants to express. But he may hold it back. He may be encouraged to develop that which is within him and to express it by hope of pecuniary reward; and that is all the Constitution aims at. It is not to secure a natural right that the Constitution gives this power. The Constitution gives Congress the power for the purpose which is stated there—the encouragement of useful arts. It is the expedient that is aimed at. So it is solely a question of expediency and fairness relating to justice. In other words, expediency suggests fairness in the distribution of such encouragement as Congress is authorized to give. So it seems to me that we accomplish this purpose in the measure which gives to the author a protection in the way suggested in this section, severing it entirely from copyright.

There are some prudential reasons to be considered. We shall be asked, of course, why not provide somewhat that the copyright, whether in the hands of the author or of the assignee, should carry with it the power to exact uniform royalty? I answer two things.

First, it is a fact that the great majority of composers, with few exceptions, are disposed to accept a small sum for a present sale of copyright, rather than await the contingencies of publishing and marketing. The author is perhaps in immediate need. I could indefinitely multiply instances, but suffice it to say that the fact is that at least a majority of composers in selling their copyrights would not get a cent more under this bill than they would under the copyright act as it now stands. I am informed, and believe, that there are very large numbers of composers who are more or less under time contract to give to certain publishers their compositions. Such contracts are made under the present law. To add this new

source of revenue would simply make a donation to the publisher, who has made his contract and purchase in view of the old statute.

MR. JOHNSON. May I ask if Mr. Burton does not know that that was one of the arguments against the passage of the copyright bill of 1891?

MR. BURTON. I was not here at that time.

MR. JOHNSON. I was. And don't you know that there is not an author in this country who is not from 50 to 100 per cent the gainer by the copyright law of 1891, which gave him that which he himself created instead of giving it to somebody else?

MR. CURRIER. Suppose Congress in this act gave certain new property rights, would the courts hold that the publishers under prior contracts, which did not contemplate those rights at all, could take them? Would not the courts hold that neither of the parties to the contract contemplated the transfer of the rights from the composer to the publisher, and that they still remained in the composer?

MR. BURTON. It would not be impossible for such an interpretation to be given, but I should doubt it. I should be disposed to believe that when the parties made these previous contracts they took the hazzard of a change in the copyright law.

MR. CURRIER. If your contention is true, that they have not these rights now is true, then Congress is creating some new property rights that neither party contemplated.

MR. BURTON. True, but if it was still under the copyright law I should myself, if I were a composer, hesitate a long time before I should act on the theory that the copyright did not contemplate present or future change. If I had the other side, I might argue that way, but I should have little confidence in it.

I want to reply to that suggestion. I did not intend to at this point, but I will. I will read the statement of a witness—George Schleiffart—who was examined on that very point. He said:

My first great success, *Careless Elegance*, which I published on royalty twenty-eight years ago, and which is still selling to-day, netted me \$11. My great song, *Who Will Buy My Roses Red*, which sold 100,000 copies, netted me \$83. My great composition, *World's Exposition March*, \$5. The *Cadet Two-Step*, 50,000 copies sold, \$4. And so I might go on ad infinitum. Out of 1,500 compositions I have probably earned \$5,000.

Mr. Schleiffart is a man who is fairly able to take care of himself as a composer; but, as is the case with a large number of composers, the composition of music is a side issue, a collateral matter, with him.

MR. SOUSA. Possibly, with the exception of the *Stars and Stripes*, the most popular composition I have ever written was *The Washington Post March*. It has gone so far over the world that in other countries they have even changed its name. I received for that march \$35, sold it outright to the publisher, but afterwards received something more when it became so popular.

MR. BURTON. It might be well to amend the provisions of this bill so as to furnish a lawyer or adviser to every composer.

MR. SOUSA. It certainly would have paid me to consult a lawyer.

Senator CLAPP. The committee will take judicial notice of the fact that it is always advisable to consult lawyers.

MR. BURTON. I hesitate to state, because it may seem to cast reflections on some publishers, but I want it understood that in existing conditions, as between the ordinary music composer and the pub-



lisher, the composer is not a business man, is not learned or experienced as to how to conduct his affairs. I will not give the name of this gentleman, but will furnish his name to the committee if it is desired. He is a professor of music in New York City, an organist, a composer, president of the New York State Teachers' Association and of other societies. I asked this gentleman a general question as to the real benefit the composer ordinarily got out of his compositions. He said: "I will give you a typical case." This man was as fairly able to watch out for himself as the ordinary man at least. He said: "I published a certain piece of music and placed it with a responsible house on royalty, payable quarterly. For the first quarter I watched the music stands and found the piece well distributed and favorably commented upon, and consequently I looked for quite a return on the first quarter day; I got \$3.25. Well, I went to the publishers. They said, 'Oh, well, it has cost a good deal for advertising and sending out circulars, and for purposes of promoting we have been giving copies away; next quarter will be better.' The next quarter I got \$4 or \$5. The third quarter I went into the market myself and with money of my own and that given to me by friends for that purpose I bought"—I won't say whether he said five hundred or a thousand copies, but take the lower figures—"I bought 500 copies, so that I knew there had been that many copies sold in the regular course of trade, and I distributed them; I bought these in the early part of the quarter, so that they should be sure to get into the regular quarterly report. That quarter my returns were \$6.50."

Mr. TINDALE. I should like to protest against this being regarded as a typical case.

Senator CLAPP. I suggest that it is not of the utmost importance.

Mr. BURTON. I recognize that.

Mr. SOUSA. I believe I have received from my publishers every dollar I was entitled to.

Mr. BURTON. I am certainly glad to hear that. I simply disclaim any intention to cast reflections, but at any rate this is only of secondary importance.

The main proposition is this: The reason for the universality of reproduction arises out of the situation of the business. The value of an automatic instrument to a purchaser depends entirely upon the number and character of perforated rolls which he can obtain for it. If one maker has by common recognition a very distinct superiority over another, the scale is turned strongly. Whenever it is recognized that one house has gained preeminence of reputation, purchasers and composers will both go to that house. Water runs down hill. If conditions change, another house may secure prominence, and it is all over with the first house.

You may start with even conditions. Let us suppose there is no tendency toward domination; the field is open for all. Some house will soon be recognized as having supremacy. Then everything goes to it. In other words, if one house has an advantage, that must be overcome by some handicap. Competition is like climbing hand over hand, and competition is ended as soon as one hand gives out. That is the reason why in this business there should not be that opportunity for domination. Neither the author nor the copyright owner should have the right to select one and cut off another. If so, other houses

must go out of business until you change the law. Once establish that domination and it will be hard to overcome. It is difficult to climb the hill in that condition of affairs. So that whether the author or the copyright owner has this right to accept a royalty, it should be by requirement of the statute so made that anyone who desires to enter into the business can do it, and so that the author shall not have the right to select his maker and confine the right to that maker.

Senator CLAPP. Mr. Burton, we will now have to ask you to postpone your further remarks, because Mr. Glockling is here and wants to speak before we adjourn for lunch, so that he may take the train.

**STATEMENT OF MR. ROBERT GLOCKLING, PRESIDENT OF THE INTERNATIONAL BROTHERHOOD OF BOOKBINDERS.**

Mr. GLOCKLING. Mr. Chairman and gentlemen of the committee, it will take but a very few minutes to deliver my message.

I desire to have reference to section 13 of the bill before the committee, known as the manufacturing clause. The purpose of it is to afford certain protection to such crafts as enter into the product of a book. So far as the bill now before you is concerned, I fully concur in all its provisions affording protection to the crafts mentioned therein. The difficulty is that it does not go quite far enough; does not afford protection to the other crafts that enter into the product.

The argument that was made before you the other day by Mr. Sutherland is fully approved by me, and has equal force as applying to the crafts that I represent.

In this connection I desire to say that myself, in conjunction with other members of the book craft, will, with your permission, draft such changes in the section as will adequately cover protection to all concerned, and which, I am sure, will fully meet with the approval of the committee in so far as the principle is established, and I will present that or send it to you within a few days.

Senator CLAPP. You can do that within a week?

Mr. GLOCKLING. Yes, sir.

The CHAIRMAN. What is the nature of the amendment you propose?

Mr. GLOCKLING. To afford protection to craftsmen.

The CHAIRMAN. Does that cover bookbinding?

Mr. GLOCKLING. Bookbinding.

Mr. SULLIVAN. At the suggestion of the committee, Mr. Glockling has appeared here in connection with the proposed amendment of section 13. He speaks for the Association of International Bookbinders. I understand his suggestion looks to the fact of a conference of representatives of the different organizations and some agreement by them upon an amendment which will be presented within a week.

Mr. CURRIER. To cover the entire manufacture of books?

A GENTLEMAN. We desire to protect the American printer, plate maker, and pressman.

Mr. CURRIER. How about presswork?

Mr. SULLIVAN. That will be included in the amendments. It is the belief of those employed in the mechanical construction of books that the entire manufacturing work should be done in the United States. We understand some publishers object to that for the reason,

as they state, that there is a certain kind of paper that can not be produced in the United States, but which must be secured in Japan or elsewhere. So we have concluded to leave out that feature, but we do desire that the complete manufacture of books, so far as concerns typesetting, plate work, and binding, shall be completed within the boundaries of the United States. So far as concerns the manufacture of paper, that is a matter we respectfully submit to the Senators and Representatives.

Mr. CURRIER. You take no interest in the raw material?

Mr. SULLIVAN. We do not propose to go further than to include the bookbinders and pressmen; that they shall be as fully protected in the copyright law as anybody.

Mr. CROMELIN. May I ask whether the committee will sit to-morrow?

The CHAIRMAN. We had hoped that at the close of the session this afternoon all interests would feel that they had been fairly heard. Is it not possible to conclude the hearing this afternoon?

Mr. WALKER. The opponents have not been heard at all. There are several here who will be able to contribute a great deal of new information to the committee, information which was not given in June. I think if the committee should limit the opponents to the musical programme to one session of half a day much information can be had from them, so that I think, in the interest of facilitating the work of the committee, as well as in justice to those present and desiring to be heard, we can present our case in full this afternoon.

The CHAIRMAN. It is the purpose of the committee to be in session three hours this afternoon, and during that time we hope to close the hearing. It is not the purpose of the committee to curtail debate unreasonably upon these questions, but I do hope that the gentlemen who are interested and who desire to speak will appreciate the fact that members of the committee have other duties to perform than to sit here and listen to argument of unreasonable length.

Mr. WALKER. I have been invited by gentlemen associated with me to make the opening observations this afternoon. I shall not repeat what I said in June unless your honor should request further information at that time. In fact, I shall be as brief as possible, dwelling only on important points. I shall be followed by other gentlemen who will be able to state to the committee matters of fact with which they are more familiar than I am. In view of the number of gentlemen who are here to speak and in view of their ability and the knowledge they have, I will say that it will be impossible for us to render to the committee all the assistance we can render, unless we are permitted more than three hours. If we were endowed with the utmost conciseness of statement, as some are, we might do so, but it is impossible for us to do so otherwise. However, we will do the best we can.

The CHAIRMAN. We will not determine that question now, but later.

The LIBRARIAN. I desire to say that Mr. Philip Mauro, who was down on our list to appear to-day, is not able to be present. He is in court and can not be here until to-morrow. I simply ask that that be noted on the record at this point.

The committee took a recess from 1 to 2 o'clock p. m.

## AFTER RECESS.

The committee reassembled at the expiration of the recess, Senator Kittredge in the chair.

The CHAIRMAN. Before Mr. Burton proceeds with his argument the committee would like to know from the gentlemen interested how many hours are desired for the presentation of the case by the opponents to subdivision g?

Mr. BURTON. I can not speak for them, Mr. Chairman.

Mr. WALKER. Mr. Chairman, perhaps I can speak as accurately as anyone in that regard. There are four able gentlemen here ready to speak, and all of them are well worthy of your attention. One distinguished patent lawyer, who is very much interested in this matter and is able to make a good argument, can not be here to-day at all, but can be here to-morrow. I refer to Mr. Mauro. I think we ought to have at least five hours in opposition to clause g.

The CHAIRMAN. Mr. Cromelin, is the gentleman to whom Mr. Walker refers the one you have in mind?

Mr. CROMELIN. Mr. Philip Mauro, counsel for the American Graphophone Company, is in court in New York to-day, but will probably be able to be here to-morrow, and would like an opportunity to appear before the committee in this matter.

The LIBRARIAN. Mr. Chairman, Arthur W. Adams, who had applied for leave to be heard, not merely on paragraph g, but on some other provisions of the bill, has written me a note saying that he is obliged to leave for New York, but would be glad to be heard to-morrow, if there is to be a session of the committee held to-morrow.

The CHAIRMAN. How much time does he desire?

The LIBRARIAN. He said he would like to have half an hour.

The CHAIRMAN. How much time does Mr. Mauro desire?

Mr. WALKER. Mr. Mauro is a concise and trained speaker and will not use any time unnecessarily. I should think about half an hour would be sufficient for him.

The LIBRARIAN. There are six speakers noted in opposition to clause g—Mr. Mauro, Mr. Walker, Mr. Dyer, Mr. Pound, Mr. Cromelin, and Mr. O'Connell.

The CHAIRMAN. The committee will be in session this afternoon until 5 o'clock. It will then take a recess until half past 7 o'clock this evening, and continue the night session until five hours have been devoted to the matter in order to hear these gentlemen. Do you desire, Mr. Burton, to be heard further by the committee?

Mr. BURTON. If the committee think I have made a fair opening, it is all I desire, provided that, if I am able to remain, I may have an opportunity of replying to any criticism that may be made of the points I have advanced.

The CHAIRMAN. The committee will determine that when the criticisms are made.

Mr. BURTON. I only want to say that the usage, which I pointed out, does obtain to some extent, by reason of which the composers are not able to derive much revenue from royalty contracts, and that would be an objection to royalty contracts. Of course, it will be said that if the music publishers have advertised the publication, so have the cutters. That remark was to be looked for; but I say that, so far as my own clients are concerned, I am sure they are making their

arrangements in such a way that the possibility of the suppression of reports and the possibility of misrepresentation will be as nearly prevented as possible. We have no objection to the making of the most stringent provisions in that regard, and we should make, ourselves, the most careful provisions to enable the composer to secure full returns and to have full opportunity to test the facts and check up in every way that is possible.

Mr. BOWKER. May I ask, Mr. Burton, whether, if the composer, under the circumstances, has difficulty in collecting royalties from his own publisher, he would not have increased difficulty in collecting from Tom, Dick, and Harry?

Mr. BURTON. As I have said, it is entirely possible to make some practical provisions to meet that situation, and, if necessary, they can be made in the bill itself so as to preclude any possibility of fraud in that respect and to insure the composer the royalties to which he is entitled. If Congress undertakes to make such provisions, it can follow the details to any necessary extent, and we are prepared to submit suggestions in that regard in order that they may secure the rights aimed at in the bill as perfectly as human provisions can secure them.

Mr. JOHNSON. May I ask if that sort of a provision in a bill like this is not very much like regulating private business? How is the Government going to collect these royalties? It strikes me as being impracticable.

Mr. BURTON. The Government does not undertake to collect them, and it is no more interfering with private business than any other limitation put upon a right granted is an interference with private business. The right is granted subject to certain requirements, and it is not unfair to business. As to the practical details of the method by which this should be accomplished, while I can see there may be differences of opinion, my own opinion is very clear that it would be but a very short time before royalties for this class of work would be so definitely fixed that it would not require the composer and the publisher many minutes to come to an agreement in a case where the cutter wanted to use the music. The first two or three instances where the royalty was to be fixed would practically determine the range within such limits as now obtain.

Mr. JOHNSON. Mr. Chairman, I regard it as of the essence of this matter that anyone proposing to criticise this bill should submit an actual technical substitute for it. How otherwise are we to know what is intended? How are we to know what we are contending with? So far as what is called the stamp copyright has been tried, with reference to literary work, it has utterly failed, and it is directly opposed to the principle of copyright. Where such a provision has been attempted, it has precluded the advertisement of the author's works, which can not be undertaken by a half a dozen people and can not be shared in by half a dozen publishers. One reason for giving the author exclusive control of his work is that he may give it to an agent, and that agent can present it to the public. That agent can afford to present it to the public because he reaps where he has sown, and he will be willing to go to the expense of advertising these things to the public in such a way as no one but an agent could afford to advertise them.

Mr. BURTON. My response to that would be, if the committee desires a response at this point, that the actual experience with regard to

perforated rolls up to this point has been that the roll advertises itself sufficiently. They do not have to do any advertising of that sort. If the music is known by name to the people who want it, they get it. The cutters are now getting what they want. This simply gives the publisher a royalty which he does not now get. So far as the publicity arising out of getting the music in this form is concerned, I believe the facts in that regard will be presented more fully than I can state them now; but I may state generally that the use of music in this form advertises it immensely, and that by reason of their use the sales of music in sheet form has increased 100 per cent in almost every instance.

Mr. BOWKER. Mr. Chairman, may I point out to you the fact that there is nothing in our American law providing for a license or for royalty? The patent law does provide for the license and royalty system, and it works perfectly well under the law, although not prescribed in the law. I can sell my patent by license or under a royalty. I submit that it is neither necessary nor desirable to include in the body of the written law a provision for royalties, any more than it is necessary and desirable in the patent law.

The CHAIRMAN. Mr. Cutter has stated to me that he desired thirty seconds of time in order to present a matter briefly to the committee.

Mr. CUTTER. Mr. Chairman, I desire only to present and read to you the following notice:

NOTICE TO PURCHASER.

This copyright volume is offered for sale to the public only through the author or press agent of the publishers, who are permitted to sell it only at retail, and at 50 cents per copy, and with the express condition and reservation that it shall not, prior to August 1, 1907, be resold or offered or advertised for resale. The purchaser from them agrees to this condition and reservation by the acceptance of this copy. In case of any breach thereof the title of this book immediately reverts to the publishers. Any defacement, alteration, or removal of this notice will be prosecuted by the publishers to the full extent of the law.—(The Authors and Newspapers' Association.)

Mr. SOUSA. As I understand your view of the law, Mr. Burton, you want something in it which will compel the composer to give his work to the entire field of mechanical music-producing machines, and give them the right to reproduce them. Am I right about that?

Mr. BURTON. Substantially.

Mr. SOUSA. You want them to be compelled by law to do that?

Mr. BURTON. Not to give him any control over the matter except to get his royalty.

Mr. SOUSA. Would you be willing that the mechanical instrument manufacturers, and all of them, should be compelled to buy all the compositions produced, and to have that put into the law?

Mr. BURTON. There is no buying involved in the matter.

Mr. SOUSA. You want to compel me to sell?

Mr. BURTON. No.

Mr. SOUSA. You want the law to make me sell to you. If that is the case, I want the lawmakers to force you to buy. I have got some compositions I would like to sell.

Mr. BURTON. If the committee thinks that is a logical deduction I have no argument to make in regard to it. It seems to me not to require any response.

Mr. SOUSA. I can not understand why you want to compel me to do something when I can not compel you to do something.

Mr. BURTON. I think Mr. Sousa looks at the matter from the wrong standpoint. It is not proposed to compel either to do anything. It is proposed to offer him something which he is not now getting.

Mr. SOUSA. One of the great points in this matter is the confidence I have in my publisher. I can go to sleep at night with the feeling that the next morning I am going to get what is due me. Suppose that under this law you have some scoundrel who will take my composition and not pay me for it. I have no redress, for the law compels me to give it to this man.

Mr. BURTON. You have the royalty which has accrued, or if they have taken it without the payment of royalty, you have a chance to sue an irresponsible person for damages. The scoundrel could take it before without your consent, and this provision would give you a definite right of recovery.

Mr. SOUSA. But if this law passes without that provision it would also give me a right to recover.

Mr. BURTON. I have presented the reasons which seem to me to be controlling ones in regard to the requirement of allowing any cutter to have the liberty to take any music he desires, namely, that the conditions of this trade are such that the moment you leave the matter open so that one house can obtain a recognized superiority in regard to its ability to use these rolls the whole trade will turn that way, and you do not secure the ordinary results of competition. You can not do that in this industry.

Mr. SOUSA. It is true that the whole bugaboo of this matter is found in this infernal Æolian business, but that condition does not obtain in the publishing business in this country.

Mr. BURTON. But the conditions are not the same in the publishing business.

Mr. JOHNSON. Why not?

Mr. BURTON. Take the school book publishing houses, for illustration. We will say that a given school must obtain all of its books from one house or another, as it pleases. Assume that such a condition exists. Then the house that has no arithmetic is out of the field; but that house can get an arithmetic, and it is only a question how soon it will overcome the disadvantage and be on a par with its competitor. And the fact that it needs one will bring the arithmetic author to it, for it is then their natural market because it needs their work. The contrary is the case in the instance of the automatic music business. The house that has already the best equipment of music is the one to which the composers will all go with their new works. If one house controlled, let us say, for convenience of comparison, 80 per cent of the production, it would have a good musical equipment and would immediately draw all of the composers to it, because it would have a larger number of customers, and would have a temporary supremacy. The result of that supremacy would be to draw purchasers, and then further composers would go to it. It is not like the ordinary conditions in ordinary competitive business.

Mr. SOUSA. But under the patent laws there is an enormous amount of litigation in the attempt to stop men from getting out their patents, but there are continually new patents coming out. Do you as-

sume to tell me that when they get up an invention of that kind they are going to stop inventions?

Mr. BURTON. But the composers will go to the house that has the advantage.

Mr. JOHNSON. That is no advantage to the house. This bill does not say that the *Æolian* Company has got to have it and that the Edison Company is not to have it. It does not even say that your firm has to have it.

Mr. BURTON. I think the point has not been grasped. If the composer can grant an exclusive license, then the house that gets the most of this business becomes dominant. My proposition is, therefore, that the composer shall not grant it to an exclusive licensee, but that the right shall be open to all who pay the royalty.

Mr. JOHNSON. Take the case of Mark Twain, whose works are published by Harper Brothers. Would you, under the law, compel Mark Twain to allow the Century Company to publish his books by paying him the same royalty, and allow Putnam to do the same thing, and any other publisher to do the same thing?

Mr. BURTON. No; because the man who buys Mark Twain's book at one house can buy another author's books at another house if he desires, and so complete his library to any extent, and that is not true with reference to these perforated music rolls.

[For substitute draft submitted by Mr. Burton, see Appendix, pp. 411-426.]

Mr. JOHNSON. But you want Mr. Sousa to be compelled to sell his compositions to anyone who will pay him the royalty. Now, why could we not get Mr. Sousa's compositions from one house and Mr. Herbert's from another and Mr. De Koven's from another. The fundamental error, Mr. Chairman, in this provision is that the public in some way has a right to have Mr. Sousa's music. Under no construction of our policy, as adopted in 1891, has the public any right to have Mr. Sousa's music any more than it has the right to have the horse of the chairman. There is a communistic principle back of all this agitation for a license to do something with a man's work which the Constitution has reserved to him, and I tell you, gentlemen, that you can not trifle with that principle. We are now in a condition of affairs in this country in consideration of property when it is absolutely essential that every constitutional enactment, every constitutional outgiving, shall put the right of property where it belongs. I say to you that this is a communistic principle, to say that the country has a right to take Mr. Sousa's music when it has not the right to take my books.

I am about to go to New York in a few minutes, and I beg your indulgence to say this: We are here to protect the essential principle of property in literary, artistic, and musical productions, and in any other intellectual productions, and you can not trifle with that principle. You must not pass a bill which does not recognize that principle. I am very glad to think that the committee is in earnest about this matter. I say to you that the principle is eternal, and it will only be a little while, if this bill is not passed, until the principle is adopted.

There is no such thing as a nonexclusive copyright. It is pettifoggery on the part of the gentleman to say that, because Congress has provided certain ways of registering a copyright, that is in no



way an infringement or limitation of his copyright. As Mr. McAdoo said in his great speech in the campaign of 1891:

Mr. Speaker, the first copyright law was written by Moses on tablets of stone—"Thou shalt not steal." Even at that time these men who were engaged in using the writings of others were properly called pirates, because they preyed upon the brains of other men. I remember that Charles Dickens, when he came to this country and saw the son of one of his publishers; said to him: "What a nice little boy you are, and your father is the greatest pirate on earth."

I mince no words in dealing with these gentlemen who come here to overthrow the rights of the musical composer. Fifteen years ago this thing was made shameful, and it has been going on ever since. They would not be in court to-day if there had been such a thing as a mechanical reproducer of music; but they come here now and ask you to give them a license to prey upon the works of those men who are an honor to their profession and an honor to America.

We are just now forming in this country a school of music. We love music in this country. Our operas, our concerts, and our theaters are well attended. We have the musical taste, but we have not yet produced a school of music. I say it is most important that nothing should be done by this committee to keep from musical composers the encouragement which has been extended to and which has operated so well in the case of the literary man and the artist.

The CHAIRMAN. I want to interrupt here to ask Mr. Cutter one question. Do you claim that Congress has the power or authority to prevent the making of a contract such as you have read from this book?

Mr. CUTTER. No, sir; I only want you to understand that this bill should be so drafted that such a contract should not be legalized.

The CHAIRMAN. Has Congress any power to declare it an illegal contract?

Mr. CUTTER. I understand it has been so declared by the courts.

The CHAIRMAN. Before you begin, Mr. Walker, let me state to you that it is now half past 2 o'clock. The committee will be in session until 5 o'clock, and then take a recess until half past 7. It will continue its session until the five hours which you gentlemen have requested is exhausted. You are to divide your time as you see fit. The committee will then adjourn until to-morrow morning, at 10 o'clock, at which time it will hear Mr. Mauro for thirty minutes and Mr. Adams for thirty minutes. At the expiration of that time public hearings will be finished.

The LIBRARIAN. Mr. Chairman, I have a communication from Mr. Davis, who has applied for leave to be heard in behalf of certain inventors, in which he informs me that Judge Walker will express what he had intended to say in that behalf.

The CHAIRMAN. Let his communication be made a part of the record.

The communication referred to is as follows:

WEST ORANGE, N. J., December 7, 1906.

*To the Senate and House Committees on Patents:*

During the interim between the last hearings and the present ones upon the copyright bill, I have devoted much time and personal funds in efforts (1) to prepare a brief of my oral arguments before your committee on June 8 last and furnish evidence substantiating the charges made by me at that time; (2) to ascertain the consensus of opinion regarding paragraph g, section 1 of

the proposed bill, of leading inventors whose rights will be mostly affected thereby; (3) to create such an organization or association of inventors as would entitle us, under the ruling of Mr. Putnam, to notice of and admission to future conferences (secret and public) in which our interests are discussed with legislative ends in view by salaried officials of the Government.

Until late last night I had hoped to be able to appear before you to-day in person and ask you to again indulge me as a representative of numerous American inventors, but most unfortunately for me and for the cause I would plead, I am incapacitated for traveling as a result of a recent operation. In order to meet the contingency arising from this unforeseen circumstance, I am just sending the following telegram:

"WEST ORANGE, N. J., December 7, 1906.

*"Register of Copyrights, Washington, D. C.:*

"Illness incapacitated me from appearing in person at the present hearing as the representative of numerous inventors whose interests are threatened by the proposed copyright bill. It would be agreeable if Mr. Albert H. Walker would be allowed time in which to plead our cause specially. Please ascertain if the Committees on Patents will grant this favor, and Mr. Walker will gratuitously and on this short notice serve a large class of inventors who look up to him and Congress to save them in this emergency. Wire me results.

"Mailing letter to Mr. Walker and appeal to committees later to-day.

"G. HOWLETT DAVIS."

It was my intention in my further oral arguments, had Providence and your gracious and honorable committees permitted, to have presented and urged the following points:

(1) That my failure to submit a brief of my former arguments, under the authority kindly extended by you, is due to the fact that Messrs. Walker, O'Connell, Cameron, and the other eminent speakers who spoke after me practically made my brief. The four contracts, copies of which are printed in the record of the former hearings, embody two of those referred to in my argument, and the record embodies such an exposé of these contracts and other matters as to completely justify my charge that "collusive elements have been at work behind the drafting of the bill."

(2) That all of the inventors with whom I have conversed concerning the bill look upon paragraph g, section 1 thereof as iniquitous, and that the great majority of them object to paying composers a royalty under any circumstances or conditions because of the facts set out in my former arguments; and because of innumerable other reasons which can be advanced.

(3) That my failure in organizing those inventors whom I represent into an association is due partly to lack of time and funds, but mostly to the sublime confidence which they have in the stability of our laws and in their Representatives in Congress.

As an amendment to the bill I urge the cancellation of paragraph g, section 1, and of all other words, clauses, and paragraphs which include mechanical devices, and as a substitute therefor, preferably to appear at the end of the bill, the following:

"*Provided*, That the expression 'works' shall not, for the purposes of this act, be deemed to include perforated music rolls used for playing mechanical instruments, or records for the reproduction of sound waves or the matrices or other appliances by which such rolls or records respectively are made."

The above is a literal redraft of a part of section 3 of the British musical copyright act, passed in August of this year, and which had been pending fifteen years.

Are the English inventors any more worthy of protection than we who lead the inventors of all nations?

Will you change conditions which have existed for one hundred and nineteen years?

Respectfully submitted.

G. HOWLETT DAVIS, *Inventor*

WEST ORANGE, N. J., December 7, 1906.

Mr. THORVALD SOLBERG,

*Register of Copyrights, Washington, D. C.*

DEAR SIR: In conformity with my telegram to you of to-day I inclose herewith for transmittal, a communication addressed to the Senate and House Committees on Patents.

I am mailing in your care a copy of the communication referred to, to Mr. Albert H. Walker, not knowing his address in Washington. I trust that you will be able to effect a prompt delivery of this letter also.

Thanking you in advance for your action in these matters, and trusting that you may find it convenient to give me some information as to the progress of the hearings from time to time, I remain,

Respectfully,

G. HOWLETT DAVIS.

The CHAIRMAN. How much time do you desire, Mr. Walker?

Mr. WALKER. One hour.

#### STATEMENT OF ALBERT H. WALKER.

Mr. Chairman and gentlemen of the committee: I appear before you to-day upon this bill, for the second time, in the same capacity in which I appeared before you in June. I appear before you as inventor, as author, as lawyer, and as the representative of many inventors and of a few manufacturers. Nearly all of those whom I represent I represent gratuitously, for they appealed to me as friend, philosopher, and guide, probably on account of my white hairs, to plead their cause before this honorable committee; and I am going to do it the best I can. There is only one party that is contributing to the expenses of my trip to Washington, and that is the Auto-Music Perforating Company of New York, which is pecuniarily interested in the automusic features of this bill.

I have no private interests to promote. Indeed, my own private interests would be much promoted by the passage of the bill exactly as it stands; and its indefinite postponement would be detrimental to my own interests; but I favor its indefinite postponement, and I oppose its passage. I do this as a jurist, as an author, and as a friend of constitutional law.

My brethren on the other side do not monopolize devotion to ethics. I am fond of ethics myself. I am opposed to the passage of this bill on any one of three grounds, and each of those grounds, in my judgment, is fatal to the propriety of the bill.

I will address myself to that part of the bill which undertakes to dominate mechanical musical instruments by the copyright laws of the United States. That is the part of the bill I am opposing to-day. I oppose that part of the bill on three grounds: First, on the ground that it is unconstitutional—plainly and undeniably unconstitutional; second, even if it were not unconstitutional it is flagrantly unjust; and, third, even if it were not unconstitutional and flagrantly unjust it is opposed to public policy. My observations will consist in an attempt to enforce each of these propositions.

When I appeared before the committee in June the committee very kindly listened to me for an hour, and the speech I then made was taken down with great accuracy and printed at pages 161 to 181, inclusive, of the arguments before the committee on the 6th, 7th, 8th, and 9th of June, 1906. The first five pages of that argument were devoted to the broad questions of common law and constitutional law which underlie this discussion. I do not intend to repeat that argument or any portion of it; but I recommend those gentlemen of the committee who desire to know what I think about the subjects there treated to read pages 161 to 165, inclusive, of the arguments made in June of this year. I propose to reenforce and strengthen that constitutional argument at present by reference to material which was

not then at my command. That material is a decision of the United States circuit court of appeals for the second circuit in the case of the White-Smith Music Publishing Company v. Apollo Company, now reported in the 147th volume of the Federal Reporter at page 226, which portion of that volume was published on November 29, 1906. The decision of the court is brief, and I ask permission to read it and then comment upon it, because, as I interpret it, and I have given a good deal of thought to it, it can not be justified at all except upon the ground that the court was convinced that Congress has no power to denominate mechanical musical instruments under the copyright law. After I have read the opinion I shall explain how I deduce that conclusion from it, and to me the conclusion is unavoidable. This is the opinion and the whole of it:

The questions raised in these cases are of vast importance and involve far-reaching results. They have been exhaustively discussed in the clear and forcible briefs and arguments of counsel. We are of the opinion that the rights sought to be protected by these suits belong to the same class as those covered by the specific provisions of the copyright statutes, and that the reasons which led to the passage of said statutes apply with great force to the protection of rights of copyright against such an appropriation of the fruits of an author's conception as results from the acts of defendant. But in view of the fact that the law of copyright is a creature of statute and is not declaratory of the common law, and that it confers distinct and limited rights which did not exist at the common law, we are constrained to hold that it must be strictly construed and that we are not at liberty to extend its provisions either by resort to equitable considerations or to a strained interpretation of the terms of the statute.

We are therefore of the opinion that a perforated paper roll, such as is manufactured by defendant, is not a copy of complainants' staff notation, for the following reasons: It is not a copy in fact. It is not designed to be read or actually used in reading music, as the original staff notation is; and the claim that it may be read, which is practically disproved by the great preponderance of evidence, even if true would establish merely a theory or possibility of use, as distinguished from an actual use. The argument that, because the roll is a notation or record of the music, it is therefore a copy, would apply to the disk of the phonograph or the barrel of the organ, which, it must be admitted, are not copies of the sheet music. The perforations in the rolls are not a varied form of symbols substituted for the symbols used by the author. They are mere adjuncts of a valve mechanism in a machine. In fact, the machine or musical playing device is the thing which appropriates the author's property and publishes it by producing the musical sounds, thus conveying the author's conception to the public.

I have not in my possession the particular sheet of perforated music that was involved in the Apollo case, but I have in my possession one which is not distinguishable therefrom, except by putting measuring instruments upon it; and if some one of you will hold one end of it I will manipulate the other end and indicate to the committee what one of these perforated music rolls is like.

The circuit court of appeals for the second circuit determined that that was not a copy of the staff notation of a piece of music. In determining that it was not a copy the court logically and necessarily had to determine that this piece of paper is not a writing, because it lacks no other element of being a copy of the staff notation except not being a writing. When used as it is intended to be used it plays the same tune that would be played by a pianist and the same tune that was intended to be played from the original staff notation. So that when you are analyzing the characteristics of the word "writing" and the characteristics of the word "copy" you will conclude that this perforated sheet of paper stops short of being a copy of the original staff notation because it is not a writing,

and for no other reason. If the court had been able to find that this was a writing they would necessarily have found it was a copy. In finding that it was not a copy they really found that it was not a writing, and it was because they thus found it was not a writing that they decided the case as they did. In finding that it was not a writing they found that the Congress of the United States has no constitutional power to denominate this kind of a valve instrument under the copyright laws of the United States.

The CHAIRMAN. Do you use the word "writing" in the strict sense?

Mr. WALKER. No; I do not at present. I am now inquiring what signification the circuit court of appeals for the second district must have given to the word "writing" in promulgating this decision.

Mr. BONYNGE. In that opinion the court declared that it would give a strict construction to the statute and that they could not give it a liberal construction. They were therefore considering the statute and not the constitutional power of Congress to enact it, were they not?

Mr. WALKER. That was the next point I was about to mention, because it was a point I consider significant. In this case, literally, the circuit court of appeals speaks of the statute; but constructively, when you interpret the decision as the result of careful analysis, you should read, wherever they use the word "statute," the words "Constitution and statute." Why so? The Constitution is itself statutory law. The only difference is that the Constitution deals with generalities and the statute with details, and in general the origin of the Constitution is in the people represented in a constitutional convention, whereas the origin of the statute is in the people represented in Congress. But in the nature of the case constitutions and statutes are alike in that they are written edicts representing the will of the people. These edicts have the same relation as each other to the common law, which is based upon immemorial usage.

Mr. BURKAN. May I ask you a question based on this decision?

Mr. WALKER. Yes.

Mr. BURKAN. Why did the court say in this very opinion, "We are of the opinion that the rights sought to be protected by these suits belong to the same class as those covered by the specific provisions of the copyright statutes, and that the reasons which led to the passage of said statutes apply with great force to the protection of rights of copyright against such an appropriation of the fruits of an author's conception as result from the acts of the defendant?"

Mr. WALKER. I hold that when the court here speaks of the statute they logically mean "Constitution or statute," although they do not use those words. That is a very important point, and I thank the gentleman from Colorado for questioning me upon that point. This is the language of the court:

But in view of the fact that the law of copyright is a creature of statute, and is not declaratory of the common law, and that it confers distinct and limited rights which did not exist at the common law, we are constrained to hold that it must be strictly construed and that we are not at liberty to extend its provisions, either by resort to equitable considerations or to a strained interpretation of the terms of the statute.

But the law of copyright is not the creature of statute, strictly speaking. It is the creature of Constitution and statute. If there

was no Constitution no statute could be enacted to lay the foundation for any law of copyright. So that if Judge Lacombe, or any other learned jurist, tells me that the law of copyright is based upon statute, independently of the Constitution, I call his attention to the fact that he has misspoken himself, because no lawyer would venture, on second thought, to affirm any such proposition. So you should read this decision as follows: In view of the fact that the law of copyright is a creation of written law, that is to say, an aggregation of Constitution and statute, and is not declaratory of the common law, and that it confers distinct and limited rights which did not exist at common law, we are constrained to hold that it must be strictly construed, and that we are not at liberty to extend its provisions, either by resort to equitable considerations or to a strained interpretation of the terms of the Constitution and statute.

The moment you permit me to insert the words "Constitution or" before the word "statute" my case is made out. You can not decline to permit me to do that, because it is as certain as anything can be that when the court speak of the "statute" they mean to speak of positive law, including "the Constitution and statute," for otherwise they would be affirming the proposition that Congress could enact a statute on the subject of copyright, without any constitutional authority so to do.

This concludes what I have to say upon that subject, except upon the topic broached by Mr. Burkan, and which he sought to insert into my speech in order to break, if possible, the force of such remarks as I might make. Now, what is the language which pleases my brother so much? It is, "We are of the opinion that the rights sought to be protected by these suits belong to the same class as those covered by the specific provisions of the copyright statute, and that the reasons which led to the passage of said statutes apply with great force to the protection of right of copyright against such an appropriation of the fruits of an author's conception as results from the acts of defendant."

Now, that language is obiter, and it got there because these judges, in the absence of a thorough argument of the case, took the same superficial view of the inherent rights of an author, which nearly everybody takes when he first gives his attention to the subject. Nearly everybody takes the same superficial view that my friend Mr. Sousa holds, namely, that the right which an author has in his intellectual productions is something sacred, and far above the provisions of all constitutions and statutes, and that any constitution or any statute which derogates from that right—nay, more, any constitution or statute that does not enforce that right—is a violation of his inherent property right.

That is all wrong. There is no foundation whatever for that theory. The whole copyright theory is based not upon the notion of inherent property right at all, but is based upon a convention of civilization. Civilization had to go far before that convention arose, and it never was known until long after the time of Shakespeare. It never was thought of in respect to the dominion of an inventor over his invention or the inherent ownership of an author in his writing. The common law never dreamed of such a thing until it

was brought out in the case of *Millar v. Taylor* in the reign of George III, and there it was brought up, not as a practical question, but as a speculative question as to whether or not there had been, anciently, such a right. Now, anciently, nobody had enjoyed such a right. It was a purely speculative proposition as to whether, prior to the reign of Anne, there had been such a right. Why not hunt back and inquire whether anybody ever asserted such a right or enjoyed such a right? If you do that, you will find the negative to your inquiry. As I said in June, in the time of Shakespeare no human being ever dreamed of any exclusive right to copy any literary work. William Shakespeare never dreamed of any law of copyright. Anybody could copy, print, and publish one of Shakespeare's plays as well as William could; and many of his plays were copied, printed, and published during his lifetime without his consent being had or thought necessary. All such a publisher had to do was to get the permission of the Crown to publish a Shakespeare play, and that permission was granted or refused according to whether the Crown thought it would harm the British people to read that play. It had no relevancy whatever to the authorship of the play.

Mr. BOWKER. Do you remember an earlier case? There was a celebrated copyright case growing out of the stealing of a copy of a manuscript, as far back as the time of St. Columba. It was brought under the common law, and there was an elaborate argument. The court decided in a very old-fashioned way that the calf must follow the cow, and the right of copyright was sustained by the court as early as that case.

Mr. WALKER. That case dealt with the ownership of the manuscript. When Milton sold *Paradise Lost*, what he sold was the manuscript, and the reason the man paid him the money for the manuscript was because he could not get it in any other way. The moment he published *Paradise Lost* there was nothing to hinder other publishers from multiplying copies as much as they pleased.

Mr. SOUSA. Do you remember that there was a time when slaves were sold in this country?

Mr. WALKER. There were slaves sold; but slavery was afterwards abolished by a constitutional amendment. You can not justify this bill until you get a constitutional amendment made to furnish a foundation therefor.

These are the grounds, in brief, upon which I claim that the proposed legislation is unconstitutional.

Mr. BONYNGE. How do you justify the granting of the right, under the copyright law, to reproduce a play?

Mr. WALKER. I do not justify it.

Mr. BONYNGE. You think it is unconstitutional?

Mr. WALKER. Certainly; plainly so. When Congress attempts to grant a monopoly, under the copyright law, to the performance of a play on the stage it is transcending its powers as plainly as possible.

Mr. JOHNSON. Have the courts so held?

Mr. WALKER. It is a significant thing that although that play-right statute has been upon the statute books in one form or another for fifty years no court has ever sustained it, and in my judgment, submitted with all deference, no court ever will sustain it. It will be upset just as soon as it is presented in a case where it must be decided.

Mr. BONYNGE. In principle the granting of a copyright to these mechanical instruments is the same as the granting of a monopoly for the reproduction of a play.

Mr. WALKER. Undoubtedly, and if that playwright statute is constitutional, this clause would be constitutional.

Now, if any member of the committee has any question to ask on the subject of the constitutionality of the bill I will be glad to answer it, if I am able.

Mr. CHANEY. How do you justify the granting of a copyright on a sculpture?

Mr. WALKER. On the ground that a sculpture is a kind of writing, known anciently as picture writing. The Constitution is broad enough to cover the two kinds of writing known to man, and the earliest kind was picture writing. Later than that came symbolic writing. Sculpture is picture writing, whereas the written English language is symbolic writing.

Mr. CHANEY. Let me ask this further question: Is the term "writing" confined and limited in its meaning by the meaning at the time of the adoption of the Constitution?

Mr. WALKER. I think it can be fairly considered in the light of what it was understood to mean at the time of the adoption of the Constitution; but I believe that when we are inquiring for the meaning of a word that is in the Constitution we are not confined to the meaning at that exact date, but we should take a view of the general force of language during that period of the world's history, which in this case is substantially the same as the view taken now.

Mr. CHANEY. I mean to ask whether, in the light of subsequent civilization, the word "writings" should have any other meaning than it had at the time of the adoption of the Constitution?

Mr. WALKER. If it has you have no right to adopt it. The Constitution, as Justice Bradley said, is not a nose of wax, which you can bend around in any direction you please.

Mr. CHANEY. But in the light of our higher intelligence at this time we can conceive of a meaning which it plainly possesses, although it did not have it at that time.

Mr. SOUSA. In Johnston's History of the Library of Congress it says that the directors of the library company of Philadelphia tendered to the President and Congress, after the letters were removed to that city in 1748, "the use of the books and their library in as full and ample a manner as if they were members of the company;" and President Washington, through his secretary, Tobias Lear, returned thanks for the attention. The dictionaries in this library were Johnson's, Bailey's, Ash's, and Phillips's; and it is fair to assume that these were used by the Federal convention in framing the Constitution of the United States. Ash defines "exclusive" as "having the power of excluding, debarring, excepting." Johnson defines "exclusive" as "having the power of excluding, denying admission, debarring from participation." Ash defines "writing" as "playing the author." Johnson defines "writing" (from writ) as "a composure, a book, for example."

Those were the dictionaries in use during the discussion of the Federal Constitution, and that was the meaning the word "writing" had at that time.



Mr. WALKER. Johnson defines "writing" correctly. The other dictionaries you speak of are books with which I am not acquainted.

Mr. SOUSA. I got the definition out of Johnson's Dictionary.

Mr. CURRIER. When you were exhibiting this perforated roll, I noticed that you made the remark that it was not a copy of a writing. Is it a reproduction?

Mr. WALKER. No; it is not a reproduction in any way at all, because it can not be read. Some gentlemen have stated that it can be read, but that is an absurdity. In order to read this perforated roll as a writing, you must, with your eyes, determine within an eighth of an inch how far the holes are from the edges of the paper, and the significance of these holes with respect to what notes they will play is dependent entirely upon their distance from the edges of the paper. The holes are often within an eighth of an inch of each other, and no human being can read that roll and determine what notes appear there, unless he can infallibly measure with his eye those slightly varying distances.

Mr. CURRIER. Is it a reproduction of his idea?

Mr. WALKER. No; it is not. His idea is never reproduced until it is put into the machine, and the machine constitutes the reproducing instrumentality. This is what the court found it to be after an exhaustive examination of conflicting expert testimony. The court held that: "The perforations in the rolls are not a varied form of symbol substituted for the symbols used by the author. They are mere adjuncts of a valve mechanism in a machine." If they were a varied form of symbols substituted for the symbols used by the author, it would be a copy of that author's work beyond any doubt, and would be a reproduction; but the court finds, as a matter of fact, that they are not a varied form of symbols, but are mere adjuncts to a valve mechanism in a machine. In fact, the court says that it is the machine itself by which is conveyed the author's conception to the public. When they speak of the author's property they do not mean any property under the Constitution and statutes of the United States, because they found that he has no such property; but they use that language harmoniously, with the view of his inherent property right in intellectual production, and I submit they use it inaccurately, because after finding that there is no such property they proceed to speak of the author's property, whereas they should have spoken of his meritorious right, not secured either by the common law or by the Constitution or by statute.

You must realize, gentlemen, that the circuit court of appeals for the second circuit is composed of very busy men, and they allowed only an hour and a half to a side for the argument of this great case, which depended upon numerous facts not before the committee at all. These important questions were not adequately presented to the court. Why? The attorney for the Apollo Company in this case was my friend, Mr. Burton, and the attorney for the plaintiff was Mr. Charles E. Hughes, now governor-elect of New York. I entertained the views which you gentlemen have gathered from what you have heard me say here, and I desired to appear and present those views to the court, but Mr. Burton firmly refused to give me any of his hour and a half in which to say anything to the court and inasmuch as I did not represent any party to the litigation I was not tech-

nically entitled to be heard. But I said to the court that my client had a hundred times as much interest in the case as the nominal defendant; that the public had a million times as much interest in it as the nominal defendant, and that I had some ideas about the matter which I would like to be permitted to state. Judge Lacombe said: "Mr. Burton can give you as much of his time as he pleases," but Mr. Burton would not give me a minute. Therefore I had to beg the court for time and they gave me only ten minutes, and during those ten minutes I was interrupted with several questions which I thought were not extraordinary in point of intelligence. The result was that the court had the benefit of no argument upon the constitutional questions involved, except such as I was able to hurl at them in ten minutes, when gentlemen were firing questions at me. Therefore I think their work is not characterized by the accuracy of statement which would have been expected if I or some other gentleman had been permitted to adequately explain my views to their honors.

Now, gentlemen, I am going to establish my second proposition, namely, that this legislation, if enacted and if constitutional, would be unjust as between individuals; and in order to do that it is necessary to connect my remarks with the speech I made in June, and particularly with a request that was made of me during that argument by Senator Kittredge, the chairman on the part of the Senate.

What I have to say now is not confined to what is denominated the Aeolian scheme, because even independent of the Aeolian scheme this legislation would be unjust. At the argument in June I submitted to the committee, according to the light I then had, what I called the Aeolian scheme, of which other gentlemen have spoken in harsh language, but I, being a person of mild character, use softened speech when I have occasion to criticise persons whose conduct does not altogether square with my opinions of propriety. I must read a little of what I said then, in order to connect with the dialogue between Senator Kittredge and myself. I then said:

The Aeolian Company made contracts with nearly all of the members of the Musical Publishers' Association. Each of those contracts provided as follows: That the particular member of the Music Publishers' Association granted to the Aeolian Company the exclusive right to make perforated sheets of paper, to play the tunes represented by all of the music published by that particular publisher, and that contract also provided that the Aeolian Company should never pay any money for that exclusive right until the Aeolian Company succeeded in getting some court to decide that the copyright laws covered the perforated paper roll. That contract also provided that the Aeolian Company should pay all the expenses of some test suit made for the purpose of testing that question.

In pursuance of that contract, the Aeolian Company caused the White-Smith Music Publishing Company to bring a suit against the Apollo Company in the southern district of New York upon a couple of little negro melodies, one of which was entitled "Little Cotton Dolly" and the other of which was entitled "The Kentucky Babe Schottische." I fancy that the copyright on both those negro melodies was not worth as much as \$1.50 and that certainly \$3 would cover the value of both of them, but they answered the purpose of a test case.

The Aeolian Company poured out money like water in that litigation and endeavored to secure from the United States courts a reversal of the decision of Judge Colt, which had been made many years before. In the course of that litigation I was retained by the Auto-Music Perforating Company, which was not a party to this litigation, but which had an interest a hundred times greater than that of the nominal defendant. In pursuance of that retainer I presented a petition to Judge Hazel, before whom the case was heard, and in that peti-

tion I asked that my client be made a defendant. And I set forth in that petition the whole Æolian scheme in full with all the clearness of statement of which I was capable, and it was sworn to by my client. When that statement was filed before the judge, a printed copy was served upon the attorney for the Æolian Company, Mr. Charles E. Hughes, one of the ablest men in the United States, who has distinguished himself in the recent insurance investigation in New York. Anything that he does not think of is not likely to be worth thinking of, and when he put in, as he did, an elaborate brief in reply to my petition he did not controvert one solitary word of the statement of evidence set forth in the petition about the inherent character of the Æolian scheme, which he would have done if he could have done so.

The CHAIRMAN. What was his reply—raising questions of law?

Mr. WALKER. I do not think his reply amounted to a row of pins.

The CHAIRMAN. Is that a matter of printed record?

Mr. WALKER. His reply? I have a copy of his brief in my office in New York.

The CHAIRMAN. Will you send that to the committee?

Mr. WALKER. I will; yes.

Senator CLAPP. And your petition?

Mr. WALKER. Yes.

That, Mr. Chairman, was a promise on my part to furnish the committee with that material, and I will now read briefly, because they are short, those portions of the petition which set forth the Æolian scheme, as it was sworn to by my client at that time. The petition was presented to Mr. Hughes several days before the argument of the case and several days before he filed his reply thereto.

The following statements were in that petition:

Fourth. The Æolian Company, of Meriden, Conn., is a large and wealthy corporation, which is engaged in making and selling automatic musical instruments and in making and selling perforated strips of paper for use in those instruments.

Fifth. There is an association of publishers of sheet music, which association includes nearly all the principal music publishers in the United States, and the members of which association copyright and publish most of the sheet music which is copyrighted and published from time to time in this country.

Sixth. The Æolian Company has a contract with each member of said association of music publishers, which contract substantially provides that the Æolian Company shall have the exclusive right to make and sell perforated sheets of paper, to be used in automatic musical instruments, for producing the music represented by any or all of the copyrighted sheet music published by that publisher; provided the Æolian Company can and does cause a decree to be obtained in some Federal court declaring such a perforated sheet to be an infringement of such a copyright; or, failing to obtain such a decree, provided the Æolian Company shall succeed in inducing Congress to enact such a statute to subject such perforated sheets to the dominion of such copyrights; but which contract also provides that the Æolian Company shall not be obliged to make or sell any perforated sheet of paper to be used in producing the music represented by any particular copyrighted sheet music, or pay any royalty thereon, unless it elects to thus make and sell such particular perforated sheet.

Seventh. This action was actually begun, and has been really prosecuted, by the Æolian Company in the name of the White-Smith Music Publishing Company, but at the expense of the Æolian Company, for the purpose of obtaining such a judicial decree as is contemplated by each of said contracts.

Eighth. If this case is decided in favor of the complainant, all of those contracts will be thereby put into operation, and will operate to give the Æolian Company the exclusive right to make and sell perforated sheets for use in automatic musical instruments to perform most of the music which the owner of such an instrument would desire to have performed thereby. That monopoly of the right to make and sell *most* of the perforated sheets which the public would wish to buy would practically result in conferring upon the Æolian Company a monopoly to make and sell *all* of the perforated sheets which the public would wish to buy, and also a practical monopoly of making and selling all automatic musical instruments operated by perforated sheets of paper, because

no prospective purchaser of an automatic musical instrument would buy one which could be used by him in playing only a comparatively few tunes when he could purchase one from the Aeolian Company, even at a higher price, for playing all the tunes which he would desire to have played, and because the Aeolian Company could present this dilemma to every prospective purchaser of an automatic musical instrument by simply declining to sell any perforated sheets for use in any instrument not made and sold by that company.

That was the Aeolian scheme as I set it forth in the petition. It was sworn to by my client on information and belief. This was the affidavit upon which my client founded his request to be permitted to prove these statements by regularly taken depositions.

I have here the brief of Mr. Hughes filed in reply to that petition, and I am going to read to the committee all that this brief contains upon the questions of fact set forth in those portions of the petition which I have read:

The petition contains numerous allegations as to the Aeolian Company. They are not supported by any evidence; they are made wholly upon information and belief. (Petition, p. 8.) The petitioner says its information was "carefully acquired" and that its belief is founded "upon convincing evidence." But the petitioner makes itself the sole judge of what is "convincing" and seeks to affect the judicial mind by assertions upon which it can not act judicially, save for the purpose of excluding them from consideration. When an attempt was made, as appears from this record, to prove assertions of this sort it resulted in a fiasco.

That is a plea which amounts to saying that the statement may be perfectly correct, but I had not proved it in regularly taken depositions.

The CHAIRMAN. What did the court say in denying your application?

Mr. WALKER. It did not comment upon the petition at all.

The CHAIRMAN. I mean what the court said on the question of permitting your client to be permitted to come into the suit.

Mr. WALKER. It did not make the slightest observation. It wrote on the back of the application "denied;" but at the same time it decided the case in favor of my views.

Mr. BURKAN. You filed a brief in that case.

Mr. TINDALE. When you were reading just now I noticed the statement that Aeolian agreement was that they would try to obtain legislation from Congress.

Mr. WALKER. I am coming to that. That is my next point. I have read to the committee all that Mr. Hughes said upon that subject. I now wish to analyze what he says, because it is logically divisible into two parts.

The first part of that paragraph contains three or four sentences which amount simply to saying that the petitioner has not proved his statements, and that part of the paragraph does not contain any statement or any intimation that the petitioner's statements are not true. It simply says that they have not been proved except by affidavit.

The last sentence is this: "When an attempt was made, as appears from this record, to prove assertions of this sort, it resulted in a fiasco."

I did not make that attempt, and Mr. Burton did not make that attempt with any such view as that. In point of fact, what Mr. Hughes refers to as Mr. Burton's attempt to prove the Aeolian scheme related to some evidence in the record to the effect that somebody on

his side of the litigation had written letters to five or six music publishers and asked them whether or not they were parties to the Æolian contracts, and one-half of them wrote back that they were and one-half that they were not. That is as far as Mr. Burkan pressed the question as to how far the Æolian contract had been agreed to by music publishers.

Here is the Æolian contract itself. I wish to say to my learned brother on the other side that at the time I prepared this petition I had never seen the Æolian contract. The Æolian contracts were kept among the secret archives of the company and of the publishers, and a copy of it had not leaked out, although information as to essential parts of it had leaked out. In preparing that petition I had to go on what had leaked out. More than a year afterwards, I, for the first time, saw the Æolian contract. When I came to analyze that contract I found out how fully it squared or did not square with the account I had given of it in the petition filed more than a year before. I find that it squares literally with every element of that account, except one. The account I gave a year before included numerous particulars, and one of those particulars was that the Æolian Company had agreed, in default of success in the courts, to attempt to secure legislation from Congress having the same operation. When you come to look at the Æolian contract you do not find that provision in form, but you do find it in substance, and I will tell you where.

You do find it in substance. The gentleman who addressed the committee to-day stated that the Æolian contract was made to depend upon the White-Smith suit, and that if the White-Smith suit failed the Æolian contract failed with it. But he is wrong about that. The Æolian contract goes into operation if the Æolian Company ever succeeds in getting a favorable decision from a court of last resort, and if they fail once they can try a second time, and so on indefinitely. If they ever do succeed in getting such a decision as will subject these perforated sheets to the copyright law, then the contract goes into effect. The Æolian contract provides that it shall go into effect whenever the Æolian Company wins a suit in the Supreme Court, and the only way they can adopt to win a suit in that court is to get Congress to enact a statute that will compel the courts to decide in their favor. So that if the Æolian Company loses this litigation in the Supreme Court a year hence, that will not end the Æolian contract at all. They can then rise up with another suit, based upon this new statute enacted by Congress, and then they will win, and then the contract goes into force.

Mr. TINDALE. That is a different statement from the one made previously to the effect that the Æolian Company had agreed to make an attempt to get legislation. This is entirely different, and I am glad to get the matter straightened out.

Mr. WALKER. There is no mystery about it at all. I made my statement on the best information then obtainable, before the Æolian contract leaked out. Now I am proving to you that although the Æolian contract did not in terms use the word "Congress" and did not in terms set forth that scheme, yet it sets it forth in substance; so that now, if any gentleman will take an hour to compare the Æolian contract with my account of that contract as set forth in

this petition he will find my account literally correct in every point except one.

Mr. BONYNGE. Will you kindly read the clause of the Æolian contract to which you refer.

Mr. WALKER. I will, indeed. I marked that yesterday, as I thought somebody would ask me to read that clause. This Æolian contract is in two parts, one avowedly referring to the other. Then there is a letter connected with the contract which is to be taken into account. There is a good deal of verbiage in it, and it would take a good while to read the whole of it, but I have carefully marked the part which will apply to your question. It is as follows:

Now, therefore, the publisher, for and in consideration of the premises and the sum of one dollar, lawful money of the United States, to him by the Æolian Company in hand paid, receipt whereof is hereby acknowledged, does hereby covenant and agree that no charge shall be exacted from or be due from the Æolian Company for the manufacture or sale by it, or any of its customers, of any perforated music sheets of either of the kinds aforesaid, for playing any of the copyrighted musical compositions which are owned or controlled, or which shall hereafter be owned or controlled in whole or in part by the publisher, until a decision of the court of last resort in a suit which is to be instituted against some manufacturer or user, other than the Æolian Company, of such perforated music sheets for the purpose of testing the applicability of the United States copyright laws to such perforated music sheets, and not then unless such decision shall uphold the applicability of the United States copyright laws to perforated music sheets of the kinds aforesaid.

Mr. BONYNGE. That refers to the then existing laws.

Mr. WALKER. Not, in my judgment, to those laws only.

Mr. BONYNGE. Do you, as a lawyer, say that refers to statutes that might come into existence after the signing of that contract?

Mr. WALKER. Certainly.

Mr. BONYNGE. Is that your legal opinion as to the construction of a contract made, based upon statutes then in existence—that it applied to statutes that may be subsequently passed?

Mr. WALKER. If it had been confined to statutes then in existence it should have said, so. It says "Copyright laws of the United States," and that language is broad enough to cover laws that are in existence at the time the suit is brought as well as laws in existence at the time the contract is signed.

Mr. CHANEY. Usually we, as lawyers, confine the meaning of a contract to the laws in existence at the time of the execution of the contract.

Mr. WALKER. I do not know that that is the universal rule. It depends upon the contract. If the language of the contract plainly contemplates the laws that are in existence at the time of the execution only, then of course we give it that signification, but when you are construing the contract you must look at the relations of the parties and the purposes they have in view. The purpose both parties had in view could be subserved just as well by a new law as by the old one.

Mr. BONYNGE. This refers to "a suit." If "a suit" has been started, upon the determination of that suit, which was the suit evidently contemplated by this contract, does not the contract terminate?

Mr. WALKER. I do not think so, because the contract referred to "a suit" in the future and not to any particular suit.

Mr. BONYNGE. It refers to "a suit" and not to "suits."

Mr. MCGAVIN. Suppose this bill is passed and the law is made perfectly plain. Do you mean to say it would be necessary to have a decision of the Supreme Court of the United States on that language?

Mr. WALKER. Certainly; because then whoever objected to that law would question its validity in point of constitutionality and go to the Supreme Court on that point. You can make the law as plain as you please, but somebody will question it on that ground.

Mr. SOUSA. You state that this contract is unconstitutional, and that under any law passed it would be unconstitutional, do you not?

Mr. WALKER. I say that any law to subject these perforated sheets to the copyright laws would be unconstitutional.

Mr. SOUSA. That is your view of it?

Mr. WALKER. Certainly.

Mr. SOUSA. And, of course, the right one.

Mr. WALKER. The contracts are not of the slightest value, unless they succeed in securing a favorable decision either on the basis of the present legislation or some future legislation.

Mr. SOUSA. Then these Æolian contracts are not worth anything?

Mr. WALKER. Sometimes unconstitutional things are pecuniarily valuable.

Mr. BURKAN. Do you, as a lawyer, contend that if this legislation is passed this contract would be valid? It was contemplated in 1902 that the enforceability of the contract should depend upon a suit. If they fail in that suit, and Congress should pass this law, do you mean to contend that this contract would be valid?

Mr. WALKER. Valid if the new law is valid.

Mr. BURKAN. Read your contract.

Mr. WALKER. You gentlemen have asked for my opinion and I give it to you.

Mr. LEGARE. Go on with your argument.

Mr. WALKER. A member of the committee has said to me in an undertone, "Go on with your argument." I am desirous of doing that, and I think more light will be thrown upon the subject, if my opponents will let me speak, rather than continually interrupt me.

Now, that Æolian scheme was set forth with perfect fairness in the petition that was filed. The petition was replied to by Mr. Hughes, one of the ablest men in the United States, now elected governor of New York, after full deliberation, and presumably he made the best reply he could make. The only reply he attempted to make was that Mr. Walker had not proved this by depositions, but only by affidavits.

The CHAIRMAN. The statement made by Governor Hughes was that the final hearing had closed December 8 and your application was made in the latter part of December, asking to have the case reopened and a hearing upon the facts in a case already closed. Is that right?

Mr. WALKER. I do not think it is quite right. Mr. Hughes took the ground that however true my facts might be about the Æolian scheme, it was too late to get them into the case. I did not deny that it was rather late to get into the case, but I was doing the best I could, and I set forth in a sworn paper in court a certain statement of facts. Mr. Hughes took the statement to make a reply to it and his reply was, first, "You are too late," and second, "You have not proved your statement of facts."

Mr. CHANEY. I think he would not be expected to examine facts if it was too late to present them.

Mr. WALKER. He would not take the risk of being sure it was too late to present them, because it is not at all unprecedented that an opportunity to prove such facts as were presented in my petition has been granted, and it would probably have been granted in this case if the judge had not decided according to my view without granting it.

Mr. CAMPBELL. The court would have granted you an opportunity to be heard.

Mr. WALKER. It was not yet up to Mr. Hughes to disprove my statements of fact, but it was up to him to deny them if they had not been true.

Silence constitutes evidence in some cases in law. Where one states a fact against a particular party and the statements are repeatedly made known to that party and that party remains silent when it would be to his interest, if he could, to deny the statements, his silence constitutes evidence to men's minds that the statements which he does not dispute are true.

I have here a sheet taken from the Musical Age, one of the most reputable and extensively circulating musical papers in this country, of the date of December 1, 1906. There is an elaborate article on section g in that newspaper. This paper says that the Æolian Company has in its possession contracts with practically every publisher of prominence in the United States, covering a term of thirty-five years, by which this company obtained full and absolute use of all musical compositions as soon as litigation or legislation secured to it the absolute control of the copyrights. The possession of these contracts will enable the Æolian Company to stifle all competition.

Mr. CAMPBELL. Do you now contend that this contract provides for legislation?

Mr. WALKER. It provides for legislation in this sense, that it authorizes the Æolian Company to secure legislation, and on the strength of that legislation to secure a favorable decision by the Supreme Court and then put the contract into force. I believe, as firmly as I believe that we are assembled here this afternoon discussing this problem, that that was an understood part of the Æolian scheme, although not expressed in words in the Æolian contract. So far as I am able to understand contracts, and I have been getting my living by legal labor for a good many years, I do affirm that that contract does enable the Æolian Company to carry out that very scheme, to secure legislation and then secure a favorable court decision on the basis of that legislation, and then to put the contract into force. If you disagree with me about that, you do; but that is my opinion, and it is based upon considerable professional labor and upon the best information I can get.

My next proposition is not connected with the Æolian scheme. Independently of that I am now going to lay down the proposition that this legislation would be unjust, and this is the foundation of my proposition: The business of inventing, making, and selling automatic music players began on a commercial scale about 1896, and it has gone on increasing from that time to this, about ten years; and during that time the sales of sheet music have far more than doubled. The sales of sheet music have increased much faster than the population has increased, and much faster than musical education has in-



creased, and much faster than any element of civilization with which you can compare those sales has increased. And that excessive increase of sales has been caused by the introduction of automatic instruments, so that John Philip Sousa occupies this position: Whereas prior to 1895 he received royalties on his sheet music without any competition whatever, and without any infringement of his sacred right by any automatic music instrument manufacturer. Since that time his royalties have more than doubled, or, at least, the royalties of composers generally have more than doubled, and as the result of that doubling of royalties he is receiving much more money for his compositions than he would have received if the automatic players had never been introduced into the art at all.

It is therefore perfectly demonstrable that the introduction of automatic music players has not deprived any composer of anything he had before their introduction. Further than that, the introduction of these automatic instruments has not deprived the composer of anything he would have had if they had not been introduced. And, further than that, the introduction of automatic musical instruments has much increased the composer's revenues from the sales of sheet music. Why so? Because the composers' tunes have been advertised far more extensively by the automatic music instruments than they could have been advertised in any other way, and those instruments have drawn to the sheet music an enormously increased demand. Thus, somebody goes along the street and hears one of Sousa's tunes played in a talking machine or in an automatically operated piano. That individual has a piano at home, but no talking machine and no pianola, and that lady or girl or young man who fancies that tune, having heard it, goes into a music store and buys the sheet notation of that music, takes it home, and plays it on the piano. If it had not been for the automatic instrument that person would never have heard the tune. Now, that is not a universal event, but the statistics show that the greatest benefit conferred upon composers in this country in the last ten years has been conferred upon them by the very people they denounce as pirates.

The CHAIRMAN. Mr. Walker, an hour has passed since you began to speak.

Mr. WALKER. With the consent of my associates, I will take a little of their time.

The CHAIRMAN. It is understood, however, that this time is taken from the time of your associates.

Mr. WALKER. Yes; I understand that my associates will permit me to have a little of their time, and I will therefore follow out this train of thought.

There is no doubt about it that certain composers are complaining, not because we take away anything they ever had or anything they otherwise would have had, but because we have not given them very much larger revenues than we have done, on account of our having done the things we have done. It is their desire to extract from our treasuries the very last drop of profit we have made out of our own brains in addition to the very large amount they have already extracted in the indirect manner I have indicated. In pursuance of their desire they stand up here and invoke these sacred ethical principles and reflect severely upon us as being pirates; whereas, instead of being pirates, we are the best friends they have.

What have we done in order to accomplish this beneficent work for these gentlemen? We have made hundreds of inventions, we have invested millions of dollars of money in producing automatic musical instruments, and we have put a vast amount of labor and ingenuity into the work, with the result of conferring upon them a large share of the fruits of our investment, our genius, and our labor.

Mr. BONYNGE. Would these machines have been any good if the composers had not composed music?

Mr. WALKER. Certainly not. In a civilized country we must all walk along together. No man lives unto himself alone or dies unto himself alone. No man who contributes to a useful art can claim the whole of the fruits of that art on the ground that if he had not made his contribution the result would not have been arrived at at all.

And so, gentlemen, although my interests are the other way, and I speak only as a jurist, as a lawyer, and as a lover of justice, I say this: That the motive and tendency of such composers as come here and ask for this legislation is a mercenary motive and not an artistic motive. I say that if Victor Herbert or John Philip Sousa or Reginald De Koven hopes to compose immortal music hereafter he must discard that mercenary spirit and be willing to let these automatic musical inventors and producers live and prosper as well as himself.

It will take me only about five minutes to present my third proposition. This legislation is opposed to public policy, because if it were enacted it would increase the price of automatic musical instruments by stifling competition, and if enacted it would impede the progress of invention in automatic musical instruments. It would confine that business to one great combination or corporation, in pursuance of the Æolian scheme. Independent manufacturers have written letters to me asking me to appear and argue for them as friend, philosopher, and guide, which I am doing, and many of them have made valuable inventions in this art. So that if you gentlemen do decide to give this monopoly to the Æolian Company, you will confine the business to such inventions as that company have. They have a good many, but they have not all. The result of your work will be to increase the price of automatic musical instruments to the people of the United States. You will also compel them to buy machines inferior to those they otherwise would buy. No one can put up a state of facts or an argument that will controvert these propositions.

Now, gentlemen, this is the last time I shall have the honor of addressing you on this subject. You have an enormous responsibility. Millions, beyond the dreams of avarice, are involved in this bill. You have come from many different parts of the United States to recommend legislation to Congress, and in framing this law and in carrying this great responsibility I hope you will brush aside all preconceived notions and everything that is superficial, and go down to the very roots of the merits of this case. When you do that, you will find that this proposed legislation is contrary to the Constitution of the United States; you will find that it is unjust as between the parties in interest, and you will find that it is contrary to that public policy, which is so dear to your official hearts.

Mr. SOUSA. Will you kindly tell me the amount of capital involved in the talking-machine business?

Mr. WALKER. That will be attended to by one of my associates, in due order.

**STATEMENT OF FRANK L. DYER, REPRESENTING THE EDISON PHONOGRAPH WORKS AND THE NATIONAL PHONOGRAPH COMPANY.**

Mr. DYER. Mr. Chairman and gentlemen, I wish to say in the beginning that the statement which was made before this committee in June, to the effect that the Edison Company were interested in any scheme or combination by which musical copyrights might be monopolized is absolutely unfounded, so far as those companies are concerned. They are unalterably opposed to those sections of the bill which relate to their business, including the section which we are now discussing.

The decisions of the Supreme Court of the United States on the subject of copyrights make it clear, I think, so far as they can, that this may be regarded as a precise definition of the word "writings." "Writings," as construed by the Supreme Court, mean a visible embodiment of an intellectual conception by which the author's idea may be comprehended by sight.

Mr. BOWKER. May I ask a question?

The CHAIRMAN. Mr. Dyer, do you desire to be interrupted?

Mr. DYER. I would rather not be interrupted, as it disturbs my train of thought.

The CHAIRMAN. The committee will protect you from interruption.

Mr. DYER. The thing which the law protects is not the idea, but the embodiment of the idea. A musical composition, if it is copyrighted at all, is copyrightable because it is a "writing," and can be read by the skilled person to whom it is addressed. That is to say, a collection of sounds or noises, the embodiment of music is not copyrightable; but a writing, which is addressed to musical people, is a thing which is copyrightable. A phonograph record is not a writing, as I contend, because it can not be read, not only because of its minuteness and its enormous complexity, but because, as distinguished from the perforated rolls, of its variability. That is to say, a phonograph record of a particular piece may be played one day, and the next day the same piece may be played on the phonograph and the two records will be absolutely dissimilar, not as to the effect on the ear but as to the effect on the eye. Mr. Edison determined to experiment in that direction in the early days, to see if it was not possible to read a phonograph record. He operated a phonograph and spoke the letter "a" into it. That letter would require the length of about 1 foot, and would be represented by many thousand extremely minute vibrations. He examined with a microscope each particular indentation and made a drawing of it, so that at the end of two or three days he had what he thought was a picture of the letter "a." He tried it again with the letter "a," and he was surprised to find that the two pictures were absolutely dissimilar. Upon investigating the matter he found that the slightest change in the pronunciation of the letter, the slightest variation

of a person's lips or vocal organs, resulted in the production of a completely different visible record, although to the ear it gave the same sound.

Mr. CHANEY. What does that prove?

Mr. DYER. That proves, to my mind, that a phonograph record is not a writing because it can not possibly be read. Some of the gentlemen present have stated that they understood a phonograph record could be read, but it is impossible to read it. It can only be heard through the ear.

The present bill proposes two important departures in the law and seeks to protect: First, sounds themselves which impress the brain through the organ of hearing, and, second, records which of themselves give no indication of their subject-matter but require to be used with a mechanical device to produce or reproduce the sounds. In other words, the bill proposes to protect the sounds themselves, so that anyone who produces those sounds on a phonograph or a piano or vocally is an infringer.

So the bill proposes to protect the sounds as distinguished from the embodiment of the sounds.

The second absolutely novel proposition which the bill proposes to engraft on the statutes is that instead of protecting the embodiment of the idea which of itself is capable of giving to the mind of the observer the idea that was in the author's mind, it seeks to protect the records which give no indication of their subject-matter, but which require to be put on a mechanical device and which then operate to produce in the one case and to reproduce in the other the intellectual idea of the author.

These are completely novel propositions in the copyright law. They have never been enforced in a single country in the world except in Italy. In the Italian courts, not in an appellate court, I understand, it has been held that a phonograph record is an infringement of a copyright, and therefore that a copyright applies to the sound and not to the embodiment of the sounds. In France the courts have held that a phonograph record, if it merely contains sounds, is not an infringement, because, the courts say, a sound can not be copyrighted; but where a phonograph contains words that have been copyrighted it is an infringement. The reason for that is that over a hundred years ago the French Government passed an act excepting from the operation of the copyright law music boxes which were imported into France in large quantities from Switzerland; and the court said that the law excepting music boxes from the copyright law would apply to these phonograph records; but if they contained copyrighted words they were an infringement.

Mr. BONYNGE. Then that ruling was because of a previous exception?

Mr. DYER. Yes. In Belgium, in Germany, in England, and in this country, up to date, phonograph records have been excepted from the operation of the statute. I think the record which we have before us gives a decision of the court of appeals in this district in which it was held by that court that a phonograph record was not an infringement of the copyright laws. No possible infringement of a copyright law, even under this act, could result from the making of the records themselves, because those records may never be used, or they may be kept until the rights have expired, or they may be

sent abroad. An infringement would only be committed when the dual thing happened, when the record, which represents a part of the infringing act, is brought into contact with the machine which makes the reproduction. In other words, the infringement would have to depend upon the doctrine of contributory infringement, as it is known in patent cases.

Mr. HINSHAW. This clause g refers to the making of a device as well as to selling it.

Mr. DYER. I do not see how the section could possibly apply to records which of themselves represent nothing at all. They are like a telegraphophone record. They are nothing of themselves.

Mr. WEBB. That clause prohibits the use of them, does it not?

Mr. DYER. I believe it does, although I am not familiar with the provisions of the bill. I only want to speak on the general propositions involved.

There is a very marked distinction to be drawn between literature and music. Literature is something which conveys intellectual thought to the reader. Music, in the popular sense, and our records contain music of a popular kind, that is to say, instead of appealing to the head it appeals to the heels, as Mr. Ingersoll has stated, may be likened to a collection of pleasant sounds that make a pleasing impression on the mind through the instrumentality of the ear. Of course I recognize that there is music that will appeal to skilled persons like Mr. Sousa in which they can hear possibly an entire novel or an entire operatic production, but I refer to ordinary music, jingling music, like the music box. The law makes no distinction between pleasing music and music which appeals to those with a musical education. In other words, it is a collection of pleasing sounds. In other words, the composer is a musical chemist, whose works are heard through the agency of the ear.

If you gentlemen pass an act by which you are to monopolize any intellectual conception which makes a mental impression through the agency of the ear—in other words, if you depart from the decision of the Supreme Court and leave out the element of visibility—then why stop at the ear? For instance, Mr. Post, who invented the Postum Cereal, has an intellectual conception that he will produce a composition that will give an impression to the mind of a substitute for coffee. That is put on the market, and it does make a pleasing impression on the mind. It would be possible, under this act, by analogy, to copyright perfumes because they make a pleasing impression on the mind through the agency of the sense of smell.

So I submit that if we depart from the limited view the Supreme Court of the United States has given to the word "writing," as meaning something that conveys a mental impression through the agency of the eye, we ought not to stop at the ear. We ought to protect Mr. Post in his preparation, and we ought to protect the perfumers in their preparations. So that when Mr. Clemens spoke the other day in reference to his surprise that the oyster had not been included, he may have spoken more wisely than he knew. I am not sure, if this bill goes through, but what the oyster would be protected.

Mr. BONYNGE. Those things are patented, are they not?

Mr. DYER. It is very difficult to obtain a patent in cases of that kind.

Mr. CHANEY. What do you say with reference to the reading by raised letters by a blind man?

Mr. DYER. That can be read by other people, but a phonograph record is absolutely unreadable by anybody.

For example, I might mention to you, as lawyers, a subpoena duces tecum which provides for the production of writings. What have the courts said must be produced in reponse to a subpoena of that kind? The furthest they have gone is to say that you can produce drawings. You can make a man produce drawings, but you can not make a man produce a model of a machine under that subpoena. If this bill should become a law, then, by a parity of reasoning, it would be possible to compel a man to come in and divulge the mental impression within his mind.

Mr. CHANEY. What kind of process is used, then, to get patented improvements into court in the trial of cases?

Mr. DYER. You can subpoena a man and make him testify concerning it or get an order of the court, I suppose, requiring him to produce infringing goods, or you can file a bill of discovery which will enable you to go in and make an examination of the infringing mechanism.

Mr. HINSHAW. Is it not true in many countries that patents are granted not merely on the product which is produced by the inventive genius, but upon the process itself?

Mr. DYER. In this country it is true.

Mr. HINSHAW. And in some other countries. Wherein is the difference between that proposition under the patent law and this one we have here?

Mr. DYER. I had intended to devote some of my time to the discussion of the analogy between the question we have here and the question of patent law, because I know nothing about copyrights and I have made a study of the patent law.

Mr. WALKER. If Mr. Dyer will permit me to answer this specific question, I will say that the Constitution provides for promoting progress in useful arts, and in pursuance of that provision Congress has enacted statutes granting patents on processes, the processes being arts. In fact, the definition of the word "art," as it appears in the Constitution, is now somewhat narrower than was intended, and it is confined to particular processes, so that no art is patentable unless it is also a process.

Mr. DYER. I submit, gentlemen, that a radical change in the law would seriously disturb vested interests which have enormously developed under the present law. The National Phonograph has a pay roll of over \$45,000 per week, over 4,000 employees, and makes over 100,000 records and 1,500 machines daily. Current music is as necessary as current news to a newspaper. The business has developed under the security of the present law, without protest from the publishers or composers, without suit, and without knowledge of an attempt to change the law. Many publishers, in fact have sought to popularize their productions by having them put on the phonograph.

The CHAIRMAN. How does the Edison Company secure the music that it is desired to put in use?

Mr. DYER. The committee has not heard about the situation and it may be of interest to know about it, because it is such a specialized industry. The records are made by what are known as "the talent." All told there are not more than twenty people who make it a business to go around and visit the three large talking-machine companies—the Columbia, at Bridgeport; the Edison Company, at Orange, and the Victor Company, at Philadelphia. Everyone can not sing into a phonograph. It requires a special talent to do it. You have to have a special kind of voice and a special technique. In singing certain notes they have to move close to the horns, and in singing other notes they move back. People who are singing these songs are constantly moving back and forth to produce the records. These people come to us with the music they propose to give us. They are like vaudeville artists. They say, "Here is a new song I would like to sing for you." The words of the song are written in typewriting, because the talking machines are only capable of running for about three minutes, and therefore an entire song can not be given. They usually give one verse and two choruses. If the song is short, they give two verses with the chorus.

Then by reason of the shortness of the record they frequently have the music scored out so as to fit on the machine. In other words, they come to us with their wares and sing them into the machine. We do not know whether they are copyrighted or not, or where they get them. I suppose in many cases we buy copyrighted music. I am not specially familiar with the business side of our enterprise.

But current music in the phonograph business is like current news to the newspapers. We have to have it. A man has a Victor talking machine and his neighbor, who has an Edison phonograph, hears that record and wants it. He writes down to us for that record and we furnish it. The poor people in the United States hear of the great operas that are going on in New York, and of these popular hits by the Rogers Brothers and people of that kind, and they want to hear that music. They write in to us and say: "Why don't you give us that record?" So that you see at once we have to supply popular music, just as the magazines supply popular news items, and the newspapers supply popular news items.

The CHAIRMAN. You have now reached the point, as I understand it, at which complaint is made. Mr. Sousa and other composers and authors of these popular airs object to having them used in the manner you have described, without giving them satisfactory compensation. What have you to say about that complaint?

Mr. DYER. I say, as to this complaint, that it is not founded in law, in ethics, or in morality. However, if the committee does not agree with my proposition and believes that something ought to be done, I would advise my client not to pay any further tribute, and I suppose the question of the constitutionality of the act would have to be settled. If that has to be done, then I submit that every possible safeguard should be provided in the act to protect these companies during the time that this is being litigated, so that we would not be harassed by injunctions and have our goods impounded and our business stopped pending a decision.

The CHAIRMAN. Eliminating the question as to the constitutionality of the act, what do you say about the equity of the complaint which the composer makes?

Mr. DYER. I do not see any equitable ground for their complaint. As a matter of fact, we have in the past had many publishers come to us with requests to publish their music, because it becomes popular in that way. I understand that through the instrumentality of talking machines the demand for sheet music has enormously increased.

Mr. BONYNGE. The demand for the writings of public men and authors have also very materially increased.

Mr. DYER. Yes, sir.

Mr. BONYNGE. And they continue to get paid for them through the copyright law when they furnish them; is not that true?

Mr. DYER. Yes.

Mr. BONYNGE. Is there any distinction between the two?

Mr. DYER. In an ethical sense?

Mr. BONYNGE. Yes.

Mr. DYER. I don't know as there would be in an ethical sense. It seems to me that, ethically, we are entirely justified, but possibly that is because we have become accustomed to it.

Senator SMOOT. Would your company object to paying a royalty for the use of these popular airs to the composers, if all other companies had the right to pay the royalty and secure the production?

Mr. DYER. If that is what the committee thinks ought to be done, if that can be constitutionally done, and if the court says we shall pay further tribute, of course we prefer to do it rather than to have our business interrupted.

Senator CLAPP. Why do you use the expression "further tribute?"

Mr. DYER. Because we already pay tribute when we buy the music, assuming that it has been copyrighted.

The CHAIRMAN. You pay the artist an agreed compensation?

Mr. DYER. Yes; they get paid by the day.

The CHAIRMAN. And he gets the music from the music store?

Mr. DYER. Yes, sir; that is, as I understand it; although in some cases, possibly, we buy the music ourselves.

Drawing an analogy from the patent practice, I submit that, under these circumstances, when we have gone on for fifteen years under the present law without molestation, have invested large sums of money as capital in these enterprises, and have built up a business along these lines which has now become established, that, as a matter of equity, the publishers and the public are estopped from contesting our right to go on further. I submit that we should be allowed to do so.

The analogy to which I would like to call your attention is found in the doctrine of the patent law, because the patent law is very much more firmly established than the copyright law. I may invent a machine, patent it, and start to operate under that patent. One of my competitors finds that the claims of my patent can be avoided by omitting some unimportant detail or by varying the construction in some immaterial respect, even although the idea fully realized my intellectual conception. He makes those changes and goes into business himself. I find, when I consult my attorney, that he does not infringe my patent. My attorney then advises me to have my



patent reissued. I go to the Patent Office and the Patent Office say: "Certainly, you ought to have had this broad claim in the first instance. Your attorney was derelict or did not understand his business. You are entitled to a broad claim, which would cover this man's mechanism."

This question has been very frequently submitted to the Supreme Court. The Supreme Court does not say that you can continue the infringement up to the date of the reissue of this patent, but you must stop from that time on and go to making something else. The Supreme Court says that you can continue to make that device as long as you choose; that you have obtained rights you are entitled to under the law as it existed when you went into the business; and that this man, by reason of the reissue of his patent and the change of his grant, can not affect you.

The CHAIRMAN. Do you understand that the proposed legislation was intended to affect any conditions that are now existing or that have existed in the past?

Mr. DYER. Not at all; but future copyrights.

The CHAIRMAN. Then in what way is your argument pertinent to this question?

Mr. DYER. I thought that it was somewhat analogous, from the fact that the Supreme Court says, in the case of an infringer, that you can not make him pay for infringements that were committed up to the date of this reissue. It seems to me that would be analogous to the position taken in this bill. The Supreme Court has said that when these rights have once become vested you can not divest them.

Mr. BONYNGE. The difference is that you still have a vested right in this piece of music, copyrighted before the passage of this act, and would continue to have it after the passage of this act. It would be only the new pieces of music, composed after the passage of the act, to which the act would apply.

Mr. DYER. That is very true; but we would have to change the whole business scheme of our enterprise, and, I believe, that if we were obliged to stop using current music the company would not succeed.

We make two kinds of records. We make the ordinary record—that is, popular record—and then we make what we call grand opera records. We exert special pains in the making of those grand opera records, and try to make them just as good as we possibly can. We try to sell them to the public, and we do sell them to some extent; but I do not think that the sale of the grand opera records amounts to 1 per cent of the sales of current music. I think we would probably not be able to succeed if we were denied the use of current music.

Mr. HINSHAW. How would you be denied the right to use them?

Mr. DYER. We would be infringing rights.

Mr. BONYNGE. You could get them by complying with the law and paying royalty to the composers.

Mr. DYER. That would be possible if we could make proper arrangements with the composer; but when there is a monopoly it is sometimes impossible to make arrangements, particularly where such combinations exist as have been suggested in this case.

Mr. CHANEY. You have no trouble in buying your machines?

Mr. DYER. We make the machines.

Mr. CHANEY. You have got a monopoly on that, have you not?

Mr. DYER. No; we think we are very badly treated in the way of infringements. It may be of interest to you gentlemen to know that Mr. Edison has never made a solitary cent out of any of his patents.

Mr. CAMPBELL. That means that the company makes the money under Mr. Edison's patents.

Mr. BOWKER. Will you repeat that statement?

Mr. DYER. It is that Mr. Edison has never made a cent out of his patents.

Mr. BOWKER. How about stock in the illuminating company?

Mr. DYER. I do not know anything about the details of his business.

Mr. HINSHAW. You mean that he has made his money out of the manufacture?

Mr. DYER. Yes; out of his business. He is a manufacturing patentee.

In this business a composer's chance is small, since of the many thousand musical copyrights registered, only about forty are used each month. Under the present law, composers have only to submit their compositions to the talking-machine companies, instead of the publishers. Under the present law, and under the situation as it exists to-day, the composers can be adequately protected, because in the talking-machine business a scoop is just as important as it is in the newspaper business. If Mr. Sousa would come to us with one of his compositions and we should have an opportunity of putting that on the record three months ahead of our competitor, it would be of great value to us, and we could pay him very handsomely for that composition. So I think that so far as the composers are concerned they have the same opportunities that a newspaper reporter has, if he has what he considers a scoop.

But, after all, why should composers be treated with any greater tenderness than inventors? They are both the creators of intellectual property. They are both referred to in the same clause of the Constitution. They should both be protected by the same laws. It is not a fact, as the gentlemen have so earnestly argued before this honorable committee, that the law contemplates the protection of intellectual property. Probably the most wonderful invention of the nineteenth century, and certainly the most beneficent, was that anæsthesia could be accomplished by means of ether. Doctor Morton, who made that discovery, obtained a patent on it, and that patent was held to be invalid, because the court said that was merely an effect; that the discovery or invention contemplated by the Constitution was something else. It was one of the greatest inventions of modern times.

Another very great invention was the electric telegraph, which was made the subject of a patent, and it was litigated before the Supreme Court. The court said that the idea of sending messages over wires by electricity was a mere principle, and that patent was held to be invalid, and the intellectual property in the idea was lost. A very simple invention, with which you gentlemen are all familiar, is the modern lead pencil with the piece of rubber in the end. That is a very simple thing, and it is a very useful invention. The court

said that was not an invention or discovery such as the Constitution contemplated, but that it was an aggregation. When you bring two old elements together, and when those elements cooperate in some way so as to produce a new effect, you can not get a patent on that aggregation, so that not all aggregations are patentable. Another inventor in San Francisco engaged in the manufacture of wooden pulleys. He discovered that he could make very much better pulleys than had ever been made before and make them very much cheaper. That patent was litigated before the Supreme Court, and the court said this is a mere mechanical method, and you can not get a patent on a mechanical method. It is not such a discovery or invention as the Constitution contemplates.

Mr. CHANEY. That was on the ground that it was not an intellectual creation at all, but was simply the gathering together of several intellectual creations.

Mr. DYER. This is one of the ideas that I wanted to emphasize before this committee, namely, that the law only contemplates the actual embodiment of an invention and not the principle involved. I think the law contemplates the registration of the sounds themselves and not any present means of embodying them.

Mr. CHANEY. You are addressing yourself to an intellectual creation. These matters were not intellectual creations. They were simply an aggregation of intellectual creations.

Mr. DYER. Those are the rules which the Supreme Court has laid down, under the broad language of the Constitution. The courts have also held that methods of doing business are not patentable.

The CHAIRMAN. Perhaps each one of those elements was patentable.

Mr. DYER. You mean in the case of the lead pencil?

The CHAIRMAN. In the case of the lead pencil and in the case of the aggregation of the different elements.

Mr. DYER. If either one or both are patentable, you can obtain a patent. But the law of aggregation is that you can not get a patent on bringing two things together, when the bringing of the two things together does not result in a new effect.

Public policy, in the law of patents, requires that when tribute has once been paid under a monopoly, that when a patentee has once been paid his price, the patented article may be used anywhere in the United States, free from restriction, even when that use invades a territorial right under the same patent. That is to say, if I am the manufacturer of folding beds in Washington, D. C., and the patentee of that bed, and I should give to Senator Kittredge, who lives in Baltimore, we will say, a license under that patent for the State of Maryland, and he also goes into the manufacture of folding beds, if a dealer in folding beds in Baltimore finds that I sold those beds cheaper than Senator Kittredge and came to Washington to buy his beds from me and paid my price for them and took them to Baltimore and sold them and used them for any purposes he saw fit, he would be protected under the patent law. This is the law as established by the Supreme Court, by reason of the public policy involved in connection with patents.

Mr. Burkan, who spoke on Saturday, very kindly gave me a copy of his brief. He refers in that brief to many patent cases and he seems to find a good deal of comfort in them. It happens that in

two of those cases I was of counsel, so I know more or less about them. And I find in reference to those two cases he has entirely misunderstood the effect of the decision. He says that, for instance, "upon the sale of a patented article the owner of the patent does not part with control over the article sold." That, of course, is absurd, and is not supported by the cases cited. If I am a manufacturer of automobiles and I sell to any one of you gentlemen one of my automobiles, you get title to that automobile and you can do with it as you see fit. You can burn it or destroy it or throw it in the river.

The cases to which Mr. Burkan refers are cases of conditional sales, where the sale was made with the express understanding that the purchaser of the patented article would observe some covenant as to selling price or manner of use. Mr. Burkan, however, failed to call attention to the most recent case on the point by the circuit court of appeals, second circuit, which is the case of *Cortelyou v. Lowe*. In that case the circuit court of appeals held that a patented article could not be sold subject to a restriction which would result in a monopoly of an unpatented device. That is to say, they said that a man who owned an automobile could not sell that automobile with the condition that you should buy your gasoline from him, because that would practically amount to a monopoly in gasoline. Yet the present bill puts the seal of legislative approval on a scheme which the courts have declared to be contrary to public policy, and which will enable copyright proprietors to do just that thing.

I have heard more or less of the suspicion, in this hearing, that there were contracts of this kind with the *Æolian Company*. I do not know anything about the *Æolian Company*, but I have not heard any suspicions that there were any such contracts with the talking-machine companies. I do not want to charge that there is a conspiracy or combination, because there seems to be more or less doubt about it. I do not want to be involved in such a discussion. But I say that if there is such a combination it is possible that such a combination would be enormously more powerful than would be possible under any system of patents. In patent practice it is not infrequent that manufacturers in a certain line, for instance in the line of harrows, will find that they are losing all their profits by fighting one another on patents, as patent suits are very expensive, and they will pool their patents with each other and license each other to use them. In that way they form more or less of a monopoly and keep their companies out of litigation. That is done in other lines, but it has never gone beyond individual industries. This bill makes it possible to practically monopolize the entire business of copyrights. It is not limited to coon songs or to dance music, but applies to the entire field.

I do not think I am betraying any confidence when I say that I have been told by a gentleman who is very intimately connected with the Music Publishers' Company, that they have seventy-five contracts, and that there are very few concerns out of that combination. Now, if it is possible to have contracts controlling 50 per cent of the musical productions it is possible to have contracts controlling substantially all of them. I think it is important for the committee to see that nothing shall be done which will permit a monopoly of that kind. It would be almost as powerful a monopoly as the taking over of the telegraph companies by the Government and then granting to

Mr. Hearst the exclusive right to use the telegraph lines for the dissemination of news.

Again, drawing an analogy from the patent law, it seems to me that the position of the composer in this matter would be like that of a patentee, who, having sold a patented shoemaking machine and received his price therefor, should claim that he had a right to a part of my profits in the use of the machine. It seems to me that the copyright proprietor should have no more protection than the patentee. He can do everything that the patentee does. If he is not making money enough out of his compositions he can sell them at the very highest price the public will pay, and he can sell them subject to such reasonable and fair conditions as he may choose to impose. If a thing is patented, and there is a demand for it, the patentee gets the highest price possible.

It seems to me that when we go that far we go as far as we should go. If this bill is passed a weapon is put into the hands of the copyright proprietor by which the public will be oppressed and his competitors harassed and possibly put out of business.

Mr. SOUSA. I understand you to state that the pay roll of the Edison Company is \$45,000 a week.

Mr. DYER. That is what I have been informed.

Mr. SOUSA. Do you know whether there are any composers or that pay roll?

Mr. DYER. I do not know anything about that.

Mr. HINSHAW. If a dramatic production is copyrighted, the copyright owner can prevent its production without the payment of tribute, can he not?

Mr. DYER. That depends upon the question as to whether the statute is constitutional or unconstitutional.

Mr. HINSHAW. Wherein does this proposition to prevent the production by machines of a musical composition differ from the production of a drama?

Mr. DYER. I think that if they would recognize the Constitution, and if they looked to the meaning of the word "writing" as defined by the Supreme Court, they would not permit a drama to be included in the word "writing." I am free to say that I think it a very doubtful question whether a dramatic performance can be constitutionally protected; but the question does not seem to have been decided by the Supreme Court. I do know, however, that many dramatic authors do restrict their copyrighted plays, and that those copyrighted plays can not be performed unless you pay \$75 to Mr. Charles Frohman, for instance. I know that has been done in connection with a small dramatic club, which wanted to produce a copyrighted play.

Mr. HINSHAW. And the question as to the constitutionality of that has never been decided?

Mr. DYER. It has never been decided.

Mr. BURKAN. May I ask you a question?

Mr. DYER. Yes, sir.

Mr. BURKAN. Do you remember this doctrine, laid down in the case of *Bobbs-Merrill Company v. Strauss* (139 Fed. Rep.), to this effect:

There is no sanction or support whatever to the doctrine that the several owners of distinct patents, each having a monopoly of its particular patent, or the several owners of distinct copyrights, each having a monopoly of his

particular copyright, may combine and conspire as to their patented articles or as to their copyrights or books published under a contract thereby to restrain interstate commerce in articles made or produced thereunder. The right or privilege to form such a combination or conspiracy is not embraced or included within the monopoly granted.

Is that the law?

Mr. DYER. I have no doubt about that. That is a Supreme Court decision.

Mr. BOWKER. I would like to ask you one or two questions. Did Mr. Edison name the phonograph?

Mr. DYER. I don't know about that. I think it is very doubtful. Mr. Edison is not a man of a classical education.

Mr. BOWKER. What does the word "phonograph" mean, literally?

Mr. DYER. I should say it meant "sound writer."

Mr. BOWKER. And graphophone means the same thing?

Mr. DYER. They claim that there is a difference.

Mr. BOWKER. It means the same thing, "sound writing," does it not?

Mr. DYER. Yes.

Mr. BOWKER. Have you happened to hear mention made of the Edison dinner, and of verses composed by me?

Mr. DYER. No; I did not.

Mr. BOWKER. Were you not at the dinner?

Mr. DYER. I was not there.

Mr. BOWKER. The fact is that those verses were recorded by my voice and nothing else. The nerves of my brain directed the vocal organs instead of the hand. Was not that literally a writing by myself?

Mr. DYER. No; I don't think so; as I understand the Constitution. I do not think that was a writing which the framers of the Constitution had in mind. However, I have made my argument and you can make your reply to it.

Mr. BOWKER. Is it not true that the operation of my brain was simply going through the nerves of the voice instead of through the nerves of the hand?

Mr. DYER. Yes.

Mr. BOWKER. And was making a record on that roll, just the same as any record is made from other records?

Mr. DYER. Yes.

Mr. BOWKER. And that intellectual product existed nowhere else at that time.

Mr. DYER. But we are dealing here not with literary compositions, but with musical compositions. I have made the distinction, which I hope I have made clear.

Mr. BOWKER. You said the business of the Edison Phonograph Company would be ruined in case this law passed. In the first place, is it not true that you make two different kinds of talking machines?

Mr. DYER. No; we do not.

Mr. BOWKER. Excuse me, but the district manager of the phonograph company was in my office last week with what is called a commercial machine, which is used as a substitute for stenographers. I wanted a machine which would reproduce music and could be used commercially, and he specifically told me that no machine made was

calculated to do both; that one worked at 120 and the other at 160 revolutions a minute. I repeated these verses to a commercial phonograph, which is used for commercial purposes only. So it is scarcely true that the business would be ruined.

Mr. DYER. I think the business would be substantially ruined if we were not able to get hold of the current publications of music.

Mr. WALKER. I am requested to announce that the next speaker on our part is Mr. Pound.

The CHAIRMAN. Before Mr. Pound begins, I understand that Mr. Cutter desires to correct, in the record, a statement he has made.

Mr. CUTTER. I wish to correct a statement I made in regard to a decision as to the legality of the notice in the front of the book, which I submitted. I find, upon consulting the case upon which I relied, that the form of notice relied upon in that case was different from the form of notice in this book. The notice in this book which I have presented claims property in the article if the contract is not fulfilled. That was not in the notice in the case to which I have made reference.

**STATEMENT OF GEORGE W. POUND, OF BUFFALO, N. Y., REPRESENTING THE DE KLEIST MUSICAL INSTRUMENT MANUFACTURING COMPANY, OF NORTH TONAWANDA, N. Y.; RUDOLPH WURLITZER COMPANY, OF CINCINNATI, OHIO.**

Mr. POUND. Mr. Chairman and gentlemen of the committee, I believe, in opening, that it is proper to pay tribute to the occasion which has brought us here. I think these hearings are great educators, and I believe they do much for the business interests represented here. They enable us all to depart with better ideas of one another, and with broader ideas as to the business activity of our country. We have 85,000,000 people, and naturally there are largely diversified interests—burning questions, keen debate, great interests trying to vindicate their right to be; these are the people's schools. These public hearings which you give us, in this way, are schools for our information and education.

I had intended to address myself more than I shall to the constitutional features of this bill; but I am somewhat impressed with the belief that possibly you have heard along that line about all that you wish to hear. I believe the bill to be absolutely unconstitutional. If passed, that will be the opinion of our firm and that will be our advice to our clients.

The CHAIRMAN. I understand that you are speaking to subsection g.

Mr. POUND. Yes, sir; that and its dependents. I desire to call the attention of the committee more particularly to the reason why we are here. We are here upon the same theory that our friend Mr. Sousa is here, who seems to be the only one of these composers who takes very much interest in this matter. It seems to me that the Musical Publishers' Association ought not to come here and say that they appear for the composers—that is a strange anomaly—rather than that he alone should appear.

I intend to exhibit to you a contract, and I believe I can convince you not only that there is some liability of a monopoly being created under this contract if you pass this bill, but that a monopoly now

actually exists beyond peradventure. I will direct your attention to the fact that the Æolian Company has got a number of these contracts. My friend Mr. Bowers said last night that they had a bushel of them. The one which I produce to you now is one which I believe you have not yet seen, and it is headed "Manufacturers' Sixty Per Cent Contract." In addition to this they have their "Publishers' Contract."

I am going to direct your attention to some of the principal provisions of this contract, which was presented to my client on or about the 1st of March last. It bears date in 1906.

Paragraph 4 says:

(4) Upon such orders as shall be sent to the company by the buyer's manufacturer or dealer, provided such manufacturer or dealer handles exclusively the players, or player pianos, or parts thereof made by the buyer, then the company shall fill such orders direct and bill to the buyer, and the company reserves the right to solicit orders for itself from the manufacturer or dealer direct, excepting the dealer who handles exclusively the players or player piano actions therefor, made by the buyer, excepting players or player pianos which take a roll not made by the company.

The word "manufacturer" under this contract refers to a piano or player maker who shall purchase player actions from the buyer, and the word "dealer" under this contract refers to a retail piano or music dealer who exclusively markets to the consumer.

Paragraph 6 says:

(6) To sell to the buyer such music rolls as are covered herein which he shall order, and bill the same to the buyer at 60 per cent discount from the catalogue prices current at this date and subject to a further rebate on annual purchases as follows:

A rebate of 10 per cent if not less than 25,000 rolls are purchased and paid for in one year.

A rebate of 25 per cent if not less than 100,000 or more rolls are purchased for in any one year.

A rebate of 25 per cent if not less than 100,000 or more rolls are purchased and paid for in any one year.

In case said buyer purchases 2,500 rolls in any month, he may retain 10 per cent of the purchase price thereof; in case said buyer purchase 4,500 rolls in any months he may retain 15 per cent of the purchase price thereof; in case said buyer purchase 6,500 rolls per month he may retain 20 per cent of the purchase price thereof; in case said buyer purchase 8,500 rolls per month, he may retain 25 per cent of the purchase price thereof; it being understood, however, that the buyer may retain the amount of but one of those percentages during each month. At the end of each year the amounts so retained shall be applied on account of the rebate to which the buyer shall then be entitled, but if said buyer shall not be entitled to any rebate, or said rebate does not amount to the amounts so retained, any balance so retained shall forthwith be due and payable by said buyer to said company.

The second general subdivision of the contract provides that the buyer will not purchase for his own use, or for sale directly or indirectly, or through his branches, any perforated music rolls except those manufactured by the company, and that he will not offer for sale, sell or deal in, directly or through his branches, any perforated music rolls except those manufactured by the company.

The next paragraph contains a provision that the buyer will cooperate with the company in order to induce his manufacturers and dealers to purchase only such perforated music rolls as are manufactured by the company, and to endeavor to induce such manufacturer or dealer to sign an agreement to that effect, and should the manufacturer or dealer at any time decline to handle the company's rolls



exclusively, excepting rolls of the size and style which the company does not make, and provided further the said manufacturer or dealer shall not at all times maintain the prices on the new rolls covered by this agreement then the company shall have the right to demand that the buyer discontinue the sale of such rolls to such manufacturer or dealer without violating this contract.

Section 4 of this same subdivision binds him not to engage in any way in the manufacture of perforated music rolls, either directly or indirectly.

The next paragraph binds him to maintain the prices of the Æolian Company.

But in paragraph 5 of the third subdivision is found the main gist of this contract. It says:

It is expressly understood and agreed that if perforated music is made the subject of copyright by statute, or it is adjudged by any trial or appellate court to be the subject of a copyright, then in either or both of these events the company may, at its option, at any time, and as often as is necessary, increase the price thereof, so as to cover royalties paid by the company, including expenses of accounting therefor. All other expenses incurred by reason of copyright by any increase as above shall likewise operate as to all contracts similar to this one with other parties.

Mr. GEORGE HAVEN PUTNAM. What is the date of that contract?

Mr. POUND. It is dated the — day of —, 1906. It was presented to our client on or about the 1st day of March, 1906.

Mr. HINSHAW. Do you know whether any of those contracts have been executed?

Mr. POUND. I am informed by the representative of the Æolian Company that they have many of them.

Mr. WALKER. Your company simply refused to make that contract?

Mr. POUND. Our company refused to make any contract whatsoever with the Æolian Company.

Mr. WALKER. That was the contract they wanted.

Mr. POUND. This was the contract which was submitted by Mr. Tremaine, of the Æolian Company, their vice-president, I believe, to my client.

Mr. WALKER. And you were told that they had a very large number of these contracts already executed?

Mr. POUND. As it was expressed to me, that they had a bushel of them.

Then, they had a separate agreement from this contract, going further than this contract does, to be executed by the dealer and not by them, in which he covenants that he will not cut their price, that he will always maintain their price, and that he will not handle, for sale or otherwise, perforated rolls other than those made by this company.

Now, gentlemen, in the light of that contract, when they have got practically all the large publishing houses of this country tied up, when they have got the manufacturers of paper rolls tied up like this, if it does not create a monopoly, what is a monopoly?

Mr. TINDALE. I can say to you right now that it does not exist among the publishers. It may exist among small dealers.

Mr. POUND. No; that statement is not true. It does exist. It absolutely exists. Has there been any denial by any representative of

the Æolian Company of the fact that they have a large number of these contracts? There is no provision in the contract that it shall be abrogated if the Supreme Court of the United States fails to sustain their contention in the case on appeal. There is no provision at all for abrogating that contract. Do you mean to tell us that when this corporation has these exclusive contracts, so that the public has not only got to buy their rolls, but their machines, that it does not constitute a monopoly?

I would like to offer this contract in evidence as a part of the record. I will say that the Universal Music Company is in fact the Æolian Company.

The CHAIRMAN. It may go in the record as part of your remarks. The contract referred to is as follows:

#### MANUFACTURERS' SIXTY PER CENT CONTRACT.

Agreement made this — day of —, in the year one thousand nine hundred and six, between the Universal Music Company (hereinafter called the company) and — (hereinafter called the buyer).

Whereas the company has special facilities for manufacturing perforated music rolls, which shall be considered by the buyer as a standard in size and design, and the buyer desires for himself and his dealers to obtain the benefits and advantages thereof.

Now this agreement witnesseth that it is mutually agreed between the company and the buyer as follows:

#### THE COMPANY COVENANTS AND AGREES.

(1) To sell to the buyer perforated music, cut by the company as ordered by the buyer, and at all times to construct such perforated music so that same shall equal in quality that which the company sells to its regular agents, dealers, customers, or contract houses, and so that said perforated music shall include the marking of the dotted expression line and regular musical terms thereon.

(2) To guarantee each roll herein referred to to be free from defect of workmanship or material, and to replace same if so defective when such defective roll is returned by the buyer to the company's factory, transportation charges prepaid, except that the company does not guarantee the paper used in the manufacture of said rolls or warrant that such paper will not swell or shrink or be affected by variations of temperature. All claims above referred to and of whatever nature must be made by such buyer within ten days after receipt by him of rolls because of defects in which claim is made; otherwise no claim will be allowed by the company.

(3) To supply such buyer with any selection in perforated form which shall appear in the company's catalogue, regularly issued, and which the company shall produce for the use of the Æolian Company in instruments manufactured by said Æolian Company; but it is expressly understood that this paragraph refers only to the music known as "Planola standard sixty-five (65) note, six perforations to the inch music rolls, cut from paper eleven and a quarter (11¼) inches wide, except as hereinafter referred to."

(4) Upon such orders as shall be sent to the company by the buyer's manufacturer or dealer, provided such manufacturer or dealer handles exclusively the players, or player pianos, or parts therefor made by the buyer, then the company shall fill such orders direct and bill to the buyer, and the company reserves the right to solicit orders for itself from the manufacturer or dealer direct, excepting the dealer who handles exclusively, the players or player piano actions therefor, made by the buyer, excepting players or player pianos which take a roll not made by the company.

The word "manufacturer" under this contract refers to a piano or player maker who shall purchase player actions from the buyer, and the word "dealer" under this contract refers to a retail piano or music dealer who exclusively markets to the consumer.

(5) To ship rolls direct to a manufacturer or dealer upon instructions from the buyer without making an extra charge therefor.

(6) To sell to the buyer such music rolls as are covered herein which he shall order, and bill the same to the buyer at sixty (60) per cent discount from the catalogue prices current at this date and subject to a further rebate on annual purchases as follows:

A rebate of ten (10) per cent if not less than twenty-five thousand rolls are purchased and paid for in any one year.

A rebate of fifteen (15) per cent if not less than fifty thousand (50,000) rolls are purchased and paid for in any one year.

A rebate of twenty (20) per cent if not less than seventy-five thousand (75,000) or more rolls are purchased and paid for in any one year.

A rebate of twenty-five (25) per cent if not less than one hundred thousand (100,000) or more rolls are purchased and paid for in any one year.

In case said buyer purchase twenty-five hundred (2,500) rolls in any month, he may retain ten (10) per cent of the purchase price thereof; in case said buyer purchase forty-five hundred (4,500) rolls in any month he may retain fifteen (15) per cent of the purchase price thereof; in case said buyer purchase sixty-five hundred (6,500) rolls per month, he may retain twenty (20) per cent of the purchase price thereof; in case said buyer purchase eighty-five hundred (8,500) rolls per month, he may retain twenty-five (25) per cent of the purchase price thereof; it being understood, however, that the buyer may retain the amount of but one of these percentages during each month. At the end of each year the amount so retained shall be applied on account of the rebate to which the buyer shall then be entitled, but if said buyer shall not be entitled to any rebate, or said rebate does not amount to the amount so retained, any balance so retained shall forthwith be due and payable by said buyer to said company.

(7) To sell to the buyer for his use or for distribution by him such catalogue of the Universal Music Company as he shall order from time to time, charging therefor thirty-three (33) cents each net, and monthly bulletins at three-quarters ( $\frac{3}{4}$ ) of a cent each.

(8) To supply to the buyer music-roll catalogues or bulletins under this agreement, the same bearing the name and address of the Universal Music Company, and no other name and address to be placed by the company on either music rolls, music-roll boxes, catalogues, or bulletins, except as herein-after provided.

(9) To supply to the buyer music rolls having a special width the same as the buyer has been obtaining from The Æolian Company, said rolls and boxes to have the buyer's special label, but such special rolls to be taken by the buyer in lots of not less than fifteen (15) of each number ordered.

#### SECOND.

In consideration of the foregoing agreements on behalf of the company the buyer covenants and agrees:

(1) That he will not purchase for his own use or for sale, directly or indirectly, or through his branches, any perforated music rolls, except those manufactured by the company, and that he will not offer for sale, sell, or deal indirectly, or through his branches, any perforated music rolls except those so manufactured by the company.

(2) That he will cooperate with the company in order to induce his manufacturers and dealers to purchase only such perforated music rolls as are manufactured by the company, as hereinbefore provided, and to endeavor to induce such manufacturer or dealer to sign an agreement to that effect, and should any manufacturer or dealer at any time decline to handle the company's rolls exclusively, excepting rolls of the size and style which the company does not make, and provided further the said manufacturer or dealer shall not at all times maintain the prices on the new rolls covered by this agreement, then the company shall have the right to demand that the buyer discontinue the sale of such rolls to such manufacturer or dealer, without violating this contract.

(3) That he will construct all the piano players and player pianos, or parts of same, manufactured and dealt in by him either directly or indirectly, to accept the pianola width or standard roll with flanges and pins, or the said instruments shall be made to accept the special width roll previously made for the buyer by the Æolian Company.

(4) That he will not engage in the manufacture of perforated music rolls in any form, either directly or indirectly.

(5) That he will at all times maintain the list prices established by the company on perforated music rolls, and that he will endeavor, either himself or through his manufacturer, to procure from each dealer, as far as possible, a contract wherein such dealer shall agree to maintain list prices, and in case any of said dealers shall at any time decline to handle the company's rolls exclusively, excepting rolls of a size and style which the company does not make, and provided further, that the said dealer shall not at all times maintain the catalogue prices on the rolls covered by this agreement, then the company shall have the right to demand that the buyer or his manufacturer discontinue the sale of its rolls to such dealer, without violation of this contract, and a manufacturer purchasing rolls of the buyer shall also agree to exact the same condition of said manufacturer's dealer.

## THIRD.

It is further mutually agreed between the parties hereto as follows:

(1) All rolls purchased from the buyer, or his manufacturer, by buyer's or his manufacturer's dealers, shall be invoiced at not to exceed fifty (50) per cent off from the list prices in the company's regular catalogue.

(2) No dealer shall be eligible under this agreement as a purchaser of the buyer, or his manufacturer, of the rolls referred to, unless he is a recognized piano and music dealer.

(3) Nothing contained in this agreement shall be construed to cover any rolls manufactured by the company for the Æolian Company, or to fit its pipe organ, or with metrostyle or other special patented markings for special use for the instruments manufactured by the Æolian Company.

(4) Should the buyer manufacture piano players or player pianos, or player parts, which instrument shall accept a roll other than covered by this agreement, then, in such case, the buyer agrees to supply such special rolls upon terms and conditions to be specially agreed upon.

(5) It is expressly understood and agreed that if the perforated music is made the subject of copyright by statute, or it is adjudged by any trial or appellate court to be the subject of a copyright, then in either or both of these events the company may, at its option, at any time, and as often as is necessary, increase the price thereof, so as to cover royalties paid by the company, including expenses of accounting therefor; all other expenses incurred by reason of copyright by any increase as above shall likewise operate as to all contracts similar to this one with other parties.

(6) The buyer agrees that he will not offer for sale music rolls, either directly or indirectly, or through his manufacturer or branches, to the dealers of the Æolian Company, when such dealer handles no other player.

(7) The company shall have the right to solicit music-roll orders from all dealers, but only for the account of the buyer or his manufacturer, when such dealer handles exclusively the players or player pianos manufactured by the buyer or his manufacturer.

(8) The company shall fill all orders for the buyer or his dealer or manufacturers within a reasonable time and as promptly as the company supplies its own dealers, excepting in case of delay from fire, flood, strikes, or other unavoidable contingencies.

(9) In case the buyer or the company violates any of the covenants of this agreement to be performed on his or its part the injured party shall have the right to terminate this agreement forthwith.

(10) And it is further agreed that should the company waive any breach of this contract on the part of the buyer the said company shall not thereby waive any subsequent breaches thereof.

(11) This agreement applies only to the United States of America and shall become operative on \_\_\_\_\_ and shall continue in full force and effect for three years from said date.

(12) It is further agreed that should this contract be violated by either party and become null and void that the company shall have the right to purchase back from the buyer any new or unsold music rolls, purchased of the company by the buyer and which the buyer may have in stock at such time, upon the basis of ten (10) per cent less than the net cost of such rolls to the buyer.

In witness whereof the parties hereto have attached their corporate seals and caused to be affixed the signature of their respective officers authorized for the purpose the day and year first above written.

Dated \_\_\_\_\_.

## DEALER'S AGREEMENT.

In consideration of being permitted to purchase perforated music manufactured by the Universal Music Company, and further, in consideration of the privilege of having access to their complete catalogues and monthly bulletins, and further, in consideration of the protection in selling prices of said music rolls by other dealers:

I, therefore, agree to at all times sell rolls purchased under this agreement at the catalogue prices, and I will in no manner, either directly or indirectly, cut such prices, and will handle for sale or otherwise no perforated rolls other than those manufactured by said Universal Music Company, provided such rolls shall be invoiced to me at all times at as low a price as to any other dealers in like quantity, and further; provided I am supplied with catalogues and monthly bulletins without cost to me for such catalogues and monthly bulletins, and further, provided my orders for rolls shall be filled with promptness equal to that of any other dealers, delay from strikes, fire, flood, or other unavoidable causes excepted.

(Signed) \_\_\_\_\_.

Dated \_\_\_\_\_.

The CHAIRMAN. Who is the representative of the Æolian Company here?

Mr. POUND. It is Mr. Bowers.

Mr. BOWERS. That is a misstatement. I stated this morning that I did not represent the company, and I did not.

Mr. POUND. He is in charge of the sheet-music department of Lyon & Healy, who are the agents of the Æolian Company. He said to me last night, in the Raleigh Hotel, that he, personally, was the one who solicited and obtained most, if not all, of these contracts. His name is signed as a witness to most of these contracts for the Æolian Company. If that does not make him the agent of the Æolian Company, I do not understand the law of agency.

Mr. O'CONNELL. Mr. Pound says there is no provision for the abrogation of this contract. There is such a provision. It is provided that in the event a dealer or buyer sells any other kind of roll they then lose their right to get any more from the Æolian Company.

Mr. POUND. Yes; but what I mean is that there is no provision for the abrogation of the contract as has been claimed in the event that the Supreme Court fails to sustain their contention.

Mr. HINSHAW. How many contracts of that kind have been executed?

Mr. POUND. I do not know.

Mr. WALKER. Does not this contract provide that if legislation can be secured it shall go into effect at once?

Mr. POUND. Yes; it anticipates this legislation.

Paragraph 5 anticipates this legislation.

Mr. BOWERS. May I interrupt you to make a statement?

Mr. POUND. Yes, sir.

Mr. BOWERS. I wish to say that this contract which the gentleman has presented is not the contract made between the Æolian Company and the publishers.

Mr. POUND. No; they make a different one with the publishers. I have already stated that they made two contracts.

Mr. CURRIER. This is the contract they make with the manufacturers?

Mr. POUND. Yes, sir.

Mr. O'CONNELL. These contracts are not to be made with houses that cut music rolls. They are only to be made with houses that, as manufacturers and dealers, use music rolls. The consequence is that if they buy a single roll anywhere else they can not get any more from the Æolian Company.

Mr. BURKAN. Is not that in violation of the Sherman Act?

Mr. POUND. Possibly it may be. But I say this committee should not put us in the position of being molested and harrassed. It is not for us to be compelled to go to the courts and to have our business tied up simply because it is possible that the contract of some other person is in violation of the Sherman Act.

Now let me explain further along the line of the Æolian contract. The Æolian people have filed for copyright in this office, and have obtained copyrights, down to the first day of this month on 984 of their rolls. On the 6th day of this month, the day before this hearing was commenced, they filed 10 more perforated rolls for copyright. The list is here and may be seen. I observe, if you please, that they have taken practically all the music of the masters. They have taken Beethoven and Handel and Chopin, Mozart, and others and have copyrighted every single one of those things. All of the older symphonies and the older operas have been copyrighted by the Æolian company on these perforated paper rolls. To date there are 994 of them. I notice that two of Mr. Sousa's marches, "The Bride Elect" and "The Stars and Stripes Forever," are included in that list. He tells me that this is news to him and that he never knew the Æolian company had done it.

Mr. SOUSA. Do you know that they have any right to do it?

Mr. POUND. No, sir; I do not. I question their right to do it. I question their right to do everything that they have done in this matter, and I am here to question it. The Æolian company went into this campaign three years ago last March and they say they have spent \$40,000 getting ready for this fight. We are brought into it at the last minute. But I say that whatever may be your opinion or your judgment as to the necessity of this bill along other lines, the independent manufacturers of this country, and there are large numbers of them, ought not to be handed over to the mercy of this monopoly or this trust which is already created.

Mr. HINSHAW. Do you know who constitutes the Æolian company?

Mr. POUND. I can not tell you. It is a Connecticut corporation and is a \$10,000,000 corporation.

Mr. CHANEY. It is not a New Jersey corporation?

Mr. POUND. No, sir.

The CHAIRMAN. It is now 5 o'clock and the hour for a recess has arrived.

The committee, at 5 o'clock p. m., took a recess until 7.30 o'clock p. m.

#### AFTER RECESS.

Mr. BOWERS. Mr. Chairman, before Mr. Pound begins I just wish to say that in the matter of the Æolian contract alluded to, that I got it for the music publishers and not for the Æolian Company; and in addition to that I make statement in answer to Mr. Cromelin that

Lyon & Healy were not the western agents for the Æolian Company. I said that we were for Chicago, but I should have added that we are for Chicago and a limited territory tributary to Chicago agents for the Æolian Company.

Mr. LOW. I should like to ask Mr. Bowers if his house owns the stock of the Æolian Company to a large proportion.

The CHAIRMAN. This is all in the time of Mr. Pound.

Mr. POUND. Yes.

Mr. BOWERS. It does not, sir.

Mr. POUND. Well, it is a fact that they are heavy stockholders in the Æolian Company, is it not?

Mr. BOWERS. The estate of Mr. Healy owns some stock, and also Mr. Gregory. They own small holdings. You said large holdings. It is quite a small portion that they own.

Mr. POUND. Mr. Bowers, in this *White-Smith v. Apollo* action the very exhibit which was the basis of that action in behalf of the Æolian Company was one of your contracts and bears your signature as a witness.

Mr. BOWERS. Yes; I witnessed quite a number of them.

Mr. POUND. That is contained on page 520 of the record of that case.

Mr. WEBB. You had better give the stenographer something a little more definite, so that you may refer to that case.

Mr. POUND. I have here the record in the court of appeals in the matter of *White-Smith Music Publishing Company v. Apollo Company*, an action in equity, and on page 520, one of the exhibits of the case, one of the contracts entered into by the Æolian Company with the Clayton F. Summy Company, of Chicago.

Mr. LOW. That matter appears on pages 13 and 14 of the arguments last June.

Mr. WALKER. I would like to ask Mr. Bowers if he did not sign nearly all of these seventy or eighty contracts as a witness?

Mr. BOWERS. I think not, sir; I signed quite a number, but not all.

Mr. WALKER. How did it happen that you represented all of the numerous publishing companies instead of representing the Æolian Company?

Mr. BOWERS. I was accredited from the Music Publishers' Association.

#### STATEMENT OF MR. GEORGE W. POUND—Continued.

Mr. POUND. Mr. Chairman and gentlemen of the committee: The statement made by Mr. Bowers just now in your presence that he is the avowed agent of the Æolian Company, he having charge for his firm of one entire department of their business, that firm being the agent of the Æolian Company and that firm having stock in the Æolian Company, he then adding to that statement that he solicited these contracts in behalf of the music publishers, seems to me to add very materially to my statement and to the importance which it gathers here, and back of it all, as I said before, is not the composers; it is the Æolian Company and this association of music publishers, who are here seeking this monopoly. Now, under the decisions of the law of the land as it stood, as it has stood, and as it stands to-day, and will stand for all time unless the Supreme Court overturns this decision—going way back to

the McTamany case, twenty years ago, and coming down through all the stages of all the litigation we have had on that subject—I say, in the light of all that jurisprudence, we were told by the Government of the United States that we had a right to engage in this business. We employed large capital, we built factories, and we put all our eggs in this basket. You have no comprehension, I firmly believe, of the magnitude of this business. As a simple illustration of it, I would say that just one of my client's purchases of talking machines and talking-machine records for the month of October last was over \$55,000 for the one month, and those go out, not to the homes of the rich of this country, but to the homes of the workingmen.

The workingman is the man who buys the talking machine. It brings home to him that which he can not get. It gives him the best operas, the best music, it gives him his evening's entertainment, and it is the home of the poor man which is primarily of necessity affected here, and when we have a contract confronting us, like paragraph 5 of this contract that I offered in evidence this afternoon, giving the Æolian Company not only a monopoly in this business, not only the monopoly in the sale of perforated paper rolls, but also saying to these dealers that they can not and dare not use any other perforated paper rolls, and not only that, not stopping there, but that they must not use any other machine than the Æolian machine—and then right along in that same paragraph giving to them the right to raise the price as they see fit, as they deem necessary, and binding that other man, that manufacturer, that publisher, not only by the contract itself, but by the written guaranty attached to the end of it, that he will live in accord with it—I say when you do that you hand over to these men here, opposed to us, an absolute unqualified monopoly such as does not exist to-day.

The CHAIRMAN. I would like to interrupt you for a moment to ask a question upon the point of the money invested in your business. Suppose composition should cease, what would happen to your business?

Mr. POUND. The composition of music?

The CHAIRMAN. The future composition of music should cease?

Mr. POUND. Of course, should future composition cease, which can not happen—

The CHAIRMAN. I understand that, but suppose it should?

Mr. POUND. If this bill passed, we even more would be at the mercy of the Æolian Company. The Æolian Company in their last catalogue, if memory serves me correctly, had a list of 9,000 perforated paper rolls. They have had copyrighted in this office about 1,000 of those rolls. It would be but a very brief day or two before all the rest of them would be copyrighted so that we would be absolutely debarred from all the old masters; we would be barred from all music in the past, and then by this contract they seek to bar us in the future.

The CHAIRMAN. Suppose this bill does not pass, and suppose that compositions should cease, in what respect would your business be affected?

Mr. POUND. It would certainly be seriously affected.

The CHAIRMAN. Now, then, this bill, as I understand, is not expected to be retroactive?

Mr. POUND. It undoubtedly is, however.

The CHAIRMAN. In what respect?



Mr. POUND. I will point that out to you, if I may. You take, for instance, in the case of these 1,000 rolls, so to speak, already copyrighted by the Æolian Company—

Mr. CURRIER. Do you suppose that the copyright they have taken gives them any right?

Mr. POUND. If this law should pass, I think so. I do not think now, at the present time, their copyright is worth anything. Frankly, no, I do not think it is worth the paper it is written on. Of course the fact that they believe that is shown by the fact that they are not endeavoring to enforce those copyrights as against us. But suppose you pass this bill, what becomes of us then on that music they have copyrighted? Certainly those copyrights would become good then.

Mr. CURRIER. Under what paragraph of this bill?

Mr. POUND. Under paragraph (g) and its dependencies.

Mr. CURRIER. Does not paragraph (g) particularly provide that this shall be a reproduction of music copyrighted after this act shall have gone into effect?

Mr. POUND. They have the records right here.

Mr. CURRIER. Would not this make it apply solely to new music copyrighted after the passage of this act?

Mr. POUND. Yes; that section taken alone so implies, but we could not come and cut these same holes.

Mr. CURRIER. Why not?

Mr. TINDALE. Will you allow me to say that these numerous rolls which the Æolian Company have copyrighted, or any other which involves the works of the old masters—nobody can do that. All in the world that the Æolian Company has copyrighted has been their own particular arrangements. Anyone, John Smith or anyone else, can make his own arrangement of any of the works of the old masters.

Mr. POUND. Then why do they copyright?

Mr. TINDALE. They copyright their own arrangement.

Mr. O'CONNELL. Mr. Chairman, I think section 6, taken in conjunction with subdivision b in section 18 would cover the question.

Mr. CURRIER. Yes. Section 6 provides that additions to copyrighted works, and alterations, revisions, abridgments, dramatizations, translations, compilations, arrangements, or other versions of works, whether copyrighted or in the public domain, shall be regarded as new works subject to copyright under the provisions of this act.

Mr. CURRIER. I was asking only for information.

Mr. O'CONNELL. If you take subdivision b of section 18 you will find that gives copyright for fifty years after "any arrangement or reproduction in some new form of a musical composition." Now, where this filing of these 994 records with the Librarian of Congress would come in would be this, that it would establish, beyond peradventure, these people were the first cutters and the first to make the new arrangement.

Mr. POUND. Now, I have here one of our perforated rolls. This roll which I exhibit to you has practically ten perforations to the inch.

The CHAIRMAN. Where do you secure the music?

Mr. POUND. Oh, from all sources. I will come to that in a moment. I am going to discuss that. You will observe that this perforation, this cutting, is different from what you have seen on other rolls to-day. We do not cut our paper, as the Æolin Company cuts theirs. There are many different ways of cutting that.

Mr. CHANEY. Could you not copyright your peculiar way of doing that, notwithstanding they copyright theirs?

Mr. POUND. That, I take it, would be a question. We want that privilege.

Mr. CHANEY. If this bill passes, would you conclude that you could not?

Mr. POUND. I would conclude that we are absolutely barred by this bill.

Mr. FURNISS. No, sir; you have a perfect right to make any arrangements of standard music.

Mr. POUND. I do not think so, with all due deference to Mr. Furniss. Here is one that has a hundred notes and here is one that has only forty-one notes.

The CHAIRMAN. Under what provision do you claim you are barred from copyrighting that roll and the Æolian Company is permitted to copyright its roll?

Mr. POUND. Because I take it that the Æolian Company would say to us that our roll—if their argument here is good for anything at all along this line—then it would follow that they would say to us that our cutting was simply a mechanical difference, that it was “a material part” of their work. That it produces the same melody, we will say, substantially the same, and that our difference was simply a mechanical difference and as such would not entitle us to a separate copyright.

Mr. CHANEY. Well, you know that it is the arrangement of words in a book and not the ideas that are copyrighted.

Mr. POUND. Yes.

Mr. CHANEY. Then would it not be so in this case?

Mr. POUND. We think it would not.

Mr. CHANEY. Why not?

Mr. POUND. It would seem so to us.

Mr. CHANEY. Why? What provision of the bill here do you think would prevent it? We are trying to get at the fact, of course.

Mr. WALKER. Mr. Pound, may I interrupt there? I have my eye on the provision at this moment. It is in subsection (b) of section 18, page 14. That is the section alluded to a moment ago, in full. Now, let me eliminate the verbiage and read as follows: “Any arrangement or reproduction in some new form of a musical composition.” The Æolian argument would be this: That, having taken one of the compositions of, say, Beethoven, and being the first to reproduce that in any form of reproduction, they hold a copyright for fifty years on all sheets to do that, because they were the first to do that. That will be their argument; so that, according to the theory of this bill, as I understand it—that because they would be the first to take a classical piece of music and perforate a sheet of paper to perform that music—they would have a permanent copyright, which would cover all perforated sheets of paper capable of rendering that music.

The CHAIRMAN. Can you not modify that, so as to take that chance out?

Mr. CHANEY. What is the trouble with eliminating that?

Mr. FURNISS. Judge Walker, if I may be permitted to say——

Mr. POUND. Wait a moment. I object to Mr. Furniss interrupting. I can not be interrupted at all times.

The CHAIRMAN. Mr. Pound has the right to use his own time if he sees fit.

Mr. POUND. Mr. Chairman, in answer to the question as to whence comes our music, a large proportion of it comes from the composers and from the publishing houses themselves. I will read to you a letter bearing date April 7, 1906. It bears the letter head of Harry Tilzer, music publisher, New York, Chicago, San Francisco, and London, and is as follows:

DEAR SIR: Am glad you received "Amity song" O. K., and I assure you I will more than appreciate all you do toward boosting my stuff along. Am inclosing you herewith "Moving day," which I wish you would also use, and I assure you I will more than appreciate the same. Wishing you all kinds of success, and hoping to hear from you in the near future,

I beg to remain, yours, very truly,

HARRY VON TILZER.

The CHAIRMAN. Is this gentleman a composer?

Mr. POUND. Yes; and a publisher. Here is a similar communication, bearing date April 25, 1906, bearing the letter head of Arthur H. Miller Music Publishing House, 509 Broadway, Baltimore. He says that he is sending us "What are you going to do when your clothes wear out," to be placed on music rolls. "Thanking you very much in advance for any favor you may show us in this matter," etc.

The CHAIRMAN. Do you pay that class of composers any compensation?

Mr. POUND. No, sir; they do not ask compensation. They ask for the advertisement coming from their music being put out on these mechanical reproductions.

The CHAIRMAN. Suppose they should desire compensation?

Mr. POUND. They never have so far—never have asked for it.

The CHAIRMAN. Gentlemen have appeared here who complain of the use of their compositions in these musical devices without their consent, without paying them a compensation.

Mr. POUND. We contend, sir, that that position is not well taken, that as a matter of fact every composer in the land and every music-publishing house in the land is glad to get the advertisement following from the mechanical reproduction of their music. It is regarded in the trade as the best assistant to the sales of their music of any form of advertising. Mr. Brooks, of the Chicago Marine Band, is another gentleman who very frequently sends his compositions to our company and requests them to be put on the rolls so as to give them publicity. Lots of these people pay singers in the music halls to sing their songs, and they pay bands and furnish them with their music.

The CHAIRMAN. That class of people would not object to the provision in the proposed law?

Mr. POUND. I don't know whether they would or not. I believe they would prefer to have it as it is now.

The CHAIRMAN. They would not object?

Mr. CHANEY. It would not interfere with them.

The CHAIRMAN. They would not object, because it does not interfere with their composition.

Mr. POUND. I think the form which their objection would take would be that if this bill created or tended to create any narrowing down of the output of music into a monopoly that it would force them to deal with one house and only one house. I think they would much prefer that their music should be cast broadcast.

Mr. WALKER. Would you let me make a suggestion there?

Mr. POUND. Yes.

Mr. WALKER. The only music composers that have appeared before this committee, either in writing or orally, to ask for this legislation are three in number, Mr. Sousa, Mr. Victor Herbert, and Mr. De Koven. Mr. De Koven did not come in person. The almost universal desire of the musical publishers of this country, as far as I can find out, is that that section (g) shall not be enacted.

The CHAIRMAN. Musical composers, do you mean?

Mr. WALKER. Yes.

Mr. SOUSA. Can I say a word here?

Mr. POUND. Not now.

Mr. WALKER. I have the floor. It has been yielded to me. I have been an attendant at all of the hearings and only two men have appeared who said they were composers and that they wanted this legislation, and those two men were Victor Herbert and Mr. Sousa. In addition to that, it has been stated here that Mr. De Koven took the same view, but he has not been here.

The CHAIRMAN. Mr. De Koven, Saturday afternoon, through Mr. Berry, as I recollect, secured permission to file his statement.

Mr. WALKER. Certainly. No doubt he agrees with Mr. Herbert and Mr. Sousa. This afternoon we had here the leader of the Marine Band in Washington, a distinguished composer also—not so famous as Mr. Sousa, but, nevertheless, his successor as master of that Marine Band. That gentleman was all ready to stand up here and tell this committee that he did not as a composer desire this legislation, but unfortunately he is unable to be here to-night. Judging from the knowledge I have been able to gather during six months it is my opinion that of all musical composers in the United States ninety-nine out of every one hundred of them are intelligent enough to know that the enactment of this bill will be against their interests, and anyhow, whether that is so or not, none of them have come here and asked to have the bill enacted. Further than that, that sheet that Mr. Putnam carries, which sets forth the gentlemen who want this bill enacted, does not contain the name of a single musical composer. It contains one heading that purports to relate to something with musical composition, and under that list are contained the names of two ladies, but no gentlemen.

The LIBRARIAN. You mean the list of participants in the conferences?

Mr. WALKER. So that the fastnesses of the North Pole, where Lieutenant Peary has lately been, is no more silent than is the great mass of musical composers of the United States in advocacy of this bill, and the situation comes down to this, that gentlemen who are not composers, who are engaged in a mercantile business, the Æolian Company and their friends, are seeking, under the guise of the merits of the musical composers, to drive their competitors out of competition with them in a commercial business.

Mr. SOUSA. Can I say a word here?

Mr. POUND. It will have to be very brief, and this will be the last interruption that I shall permit.

Mr. SOUSA. Mr. Chairman, I can not understand why the passage of this law will interfere with these gentlemen who want to go to the talking machines. If 99 per cent of the composers are willing to give them their product, all right. I can not understand why I should be robbed in that way. It will not hurt you, and if 99 per cent of them give the music to these people, all they will have to do is to pay me.

I can not understand how this law will interfere with them, and I am not standing for any publisher. I am standing for John Philip Sousa, and America.

Mr. WALKER. The interest the 99 per cent have in the defeat of the bill resides in the fact that they will sell more music if we continue to advertise their business than they will if the Aeolian Company drives us out of business.

Mr. SOUSA. I prefer to be the judge of that myself. I want to select the means of advertising my music.

Mr. MCGAVIN. Mr. Sousa, there was a representative of a phonograph company here last session who, I think, in the hearings made the statement that you at one time had come to them and besought them to put your music on their machines.

Mr. SOUSA. I beg to state here that the statement was so absurd at the time that I did not take it seriously. It is absolutely false.

Mr. CROMELIN. Mr. Chairman, I would like to state that I am the vice-president of the company referred to—the Columbia Phonograph Company. Mr. Sousa claims the city of Washington as his home. So do we. We started in business in the District of Columbia about the time Mr. Sousa, then leader of the United States Marine Band, won his first laurels as a composer. The first band records I have any recollection of were made by Mr. Sousa and his band, and I have very distinct recollection of advance scores of Mr. Sousa's being sent to our laboratory to be played on our records before the sheet music was out. There never was a time from then until now that Sousa and his band have not made talking-machine records, for which they have been liberally paid; and my company has spent thousands of dollars and have distributed millions of circulars advertising Mr. Sousa's marches.

Mr. SOUSA. But I do not want your advertisement.

Mr. CROMELIN. I know; but when you say that the statement referred to is not true, I wish the committee to know that I was here in Washington at the time, and I know whereof I speak. I do not think that Mr. Sousa, on reflection, will deny what I have stated.

Mr. SOUSA. I will not deny that my band played for their records, but I never was in the laboratory of the phonograph company in my life.

Mr. POUND. The distinction is that Brother Sousa's band goes and plays, but that he does not go in person. Now, referring to Mr. Zimmerman, the musical director of the band here in Washington, and a somewhat well known composer, I will say that, finding himself unable to remain here, he sent me his card, which I hold in my hand, with the request that I say to this committee that he believes, and that it is his opinion as a composer and band leader, that the advertisement derived from the reproduction of his music on instruments is of far more benefit to him than any small royalty which he might get.

Mr. WEBB. What is the name of the gentlemen?

Mr. POUND. Mr. John S. M. Zimmerman.

Gentlemen, we have been in this business and we have built up a great industry. So far as intellect is concerned, I think there is a lot of nonsensical sentiment in this discussion here. There is no business, no class of business, in this country which has developed a keener competition, brighter genius, than the automatic and mechanical music business. The man who invents those machines is an intellectual genius,

an intellectual giant. He is entitled to his protection just exactly as much as the composer is entitled to his. We have gone along these lines believing, and the law of the land tells us we have a right so to do, that we have a right to be in this business. We have built great factories, and what we object to here primarily and essentially is now, when they have failed in every other way, when the Æolian Company in the contest for industrial supremacy, in this contest of brains against brains, has been falling behind, if you please, a little, not hardly able to keep up in the struggle for commercial supremacy—what we object to is to then have them resort to this legislation. They set aside a fund in March, 1902, to organize and create sentiment, to institute litigation, procure legislation, and to introduce a bill in Congress. I say to pass this bill you not only take this property from us and destroy our vested rights, but you do more than that. We have paid to the United States Government hundreds of thousands of dollars in these inventions. One of my clients has practically spent \$100,000 along this line. He has 90 or 100 patents. We have been told by this Government that we were protected in that, that when we got those inventions and paid the Government for the patents upon them the law said we had a right to reproduce this music and put it on the market and sell it.

The CHAIRMAN. That is the precise question I ask you. Where is the provision in this bill that does deprive you of any existing property rights that you possess?

Mr. POUND. Because to-day we have a right to reproduce this music.

The CHAIRMAN. Music not yet composed?

Mr. POUND. Yes; any music as it is composed. We have a right under the law of the land as it stands to-day to reproduce that music—past, present, or future. This bill says to us that we can not reproduce that if some fellow tells us we can not. The argument is made here that this is a restriction of property rights. I do not take it so. You and I have not the right, under the law of the land, for instance, to indulge in the retail sale of liquors. The law of the land says you have not that right, but it goes on to say that if you pay a certain sum of money, if you get a certain number of consents, if you keep 200 feet away from a church door, from a court of justice, from a schoolhouse, etc., that then you may have that right. There is no property right which, in the full meaning of the term, is absolutely exclusive; that is, exclusive as to all conditions and free from covenants. Such a thing in this age of business development, this magnitude of enterprise we live in, could not be possible. Following along that thought, I believe it is suggested by the professor of theory in the Cosmopolitan School of Music in Chicago and by other noted musical critics and authorities that, as a matter of fact, these brains that compose the popular music of to-day do not originate anything. I believe it is contended that there is not 5 per cent of the music brought out to-day that is absolutely new. One illustration that was used in the discussion is that famous song of "Annie Rooney," which was so popular a short few years ago. That was absolutely taken from Beethoven. To be sure it was made to increase, made to run faster, but the melody is there, and that can be followed out by those competent along that line, and similarly it will be pointed out to you to-night by one of my associates in reference to the music of one of these gentlemen who have asked you to pass this bill, and he will take up some of our most

prominent successes and show you that they were published seventy years ago in Germany.

Mr. FURNISS. "Annie Rooney" is not copyrighted. It has always been in the public domain.

Mr. POUND. That does not touch the question. There is one other point. In no other country in the world is there any such law as is proposed to be enacted here. You are making and creating an absolutely radical departure from all established law and custom. I have here the German law. Reading from section 22, page 9:

Reproduction is permitted when the musical composition is, after publication, transferred to disks, plates, cylinders, bands, and similar parts of instruments for the mechanical rendering of pieces of music.

There is not any country to-day, if we except Italy, where this question is still undetermined. There is not any place in the world which gives any such right as these people ask for here. And we submit that the animus of this matter, and the contradiction of the theory that this is in behalf of the musical composers, is amply shown here by this contract which has been offered in evidence this afternoon. When the Music Publishers' Association sent their paid attorney here to stand in front of you and say he comes here as their attorney and in behalf of the musical composers I think it should be taken with a grain of salt.

Mr. BURKAN. I do say that. I am here in behalf of the musical composers.

Mr. POUND. When he says this, in the light of that contract, what is the animus, then, behind the proponents of this bill? My contention is that we ought not to be turned over to the mercies of this monopoly. As one of their gentlemen remarked here the other day in private conversation, "Why, inside of a year we will have you fellows crawling on your bellies, where you belong." Certainly they would.

Mr. BURKAN. Who told you that?

Mr. POUND. I will give the committee the name if it is desired.

Mr. HEDGELAND. Mr. Leo Feist told me that.

Mr. POUND. I do not care to mention any names. I am not going into that argument; but it does seem to me that the proper solution of this question as it is presented to us here now, and the fact is, that this bill as it is should not be passed. I believe we are all sincere, more or less, and I believe this measure as it is before you should not be enacted. I believe the only proper way of solving this question is to separate the musical composition part from the other portion of the bill altogether. Then let us all come in here and agree on a reasonable and proper measure, and we will meet these gentlemen and agree to any bill which is proper and which properly safeguards our interests. This bill does not.

We are getting rather tired these days of these large combinations and trusts and monopolies, and I tell you that the people who suffer because of these combinations in restraint of trade are always the people of the homes. The schoolboy, reading history, reading of the defense of the Pass of Thermopylæ, fires himself with emulation and ardor as he reads how the blood of those three hundred added itself to the flow of that reddening river, and afterwards in later life, in the broader knowledge of manhood, it comes to him that beyond and behind Thermopylæ lay the homes of a kingdom, and that it was not

the sacrifice of life there, it was not the splendid, indomitable, physical courage displayed there which was the moving spirit that animated it all, but it was the homes that lay behind Thermopylæ. That is what there is to this bill. It is iniquitous, it is wrong, and is especially iniquitous and especially wrong in view of these contracts that we have shown to you. This concern, a combination of gentlemen who would come here and ask at your hands a radical departure from all existing law and custom, would ask you to put in the statute books of this land a law giving them something which they have not now, which they have not either by law of equity or custom or the law of statutes, should come here with clean hands. They should not come here tarnished by an attempt in advance to create a monopoly based upon your law. The paragraph said, "As may be provided by statute."

I believe that the automatic musical instrument is an educator. I believe that it does very much indeed for the music-loving people, about whom our good friends have talked to you here. They profess great interest in the public and in the cause of musical education, but it seems to me that the public is the one and the sole element which has been omitted in their consideration. It is a very common thing, my clients tell me, to have people come into their establishments and ask them to have some piece played by one of these mechanical instruments, and for them then to buy the sheet of music so that they may take that home and learn it upon the piano, first getting the piece played upon the automatic instrument to see how it should be played. One of our friends here, one of our composers, who to-day is very active in asking you to support this bill, frankly states that one of his successes was known and called for and demanded all over the country because some talking machine had put it out.

Mr. SOUSA. Will you add the rest of that statement?

Mr. POUND. Yes. The rest of it was that you marveled why it was that in this tour, when only 200 copies of the piece of music had been sold you found this demand to have it played. People wanted to hear it, to hear what it was.

Mr. SOUSA. Exactly. I composed it.

Mr. POUND. And that finally you asked them and you were told that they had heard it on a phonograph or in some mechanical reproduction.

Mr. SOUSA. Exactly, and I was not paid for it.

Mr. POUND. Now, I submit, gentlemen, that there is more to this than this mere question of sentiment toward the composer. The composer is now getting much benefit from the mechanical reproduction of music. It can not be claimed by any serious minded man that the more you send out and advertise a piece of music but what the demand for that in the sheet music form is going to become greater. Why, the Æolian people themselves publish a catalogue of 9,000 pieces of music. Every one of these gentlemen are continually advertising all their music, of course, but they find as I say that the playing of this music is its own best advertisement.

The CHAIRMAN. Mr. Sousa complained just now saying that you did not pay him for it. Does your company object to paying Mr. Sousa for his composition used in your machines?

Mr. POUND. If you will pardon me and permit me to answer that a little later in my talk, I would be pleased to do so. It is the greatest utility for the greatest number that we contend should be considered.



Gentlemen, passing to some other features of the bill; I am not going to discuss them but briefly and suggest one or two amendments which have occurred to me. In section 15, page 11, after the word "copyright," line 20, insert "during such period only;" the thought there being to prevent actions for infringement for publication during the period of time in which a copyright might not have been perfected. It simply provides here that the action might not be brought during that time. On page 18, line 3, make it read "public performance for profit."

Mr. CHANEY. Yes; we have had that already in that shape.

Mr. POUND. On line 9, same page, after the word "conditions," insert "a sufficient security."

Mr. CHANEY. Do you think that is necessary?

Mr. POUND. Yes; I will speak of that, and after the word "rights," on the eleventh line, same page, insert "upon notice and upon such terms, conditions, and security as the court may prescribe."

The CHAIRMAN. Why do you say that is necessary in the light of the words "upon such terms and conditions as the court may prescribe?"

Mr. POUND. Because I believe in the first place that any remedy as drastic as proposed in this bill should not be granted in any case ex parte.

Mr. CURRIER. With the first amendment you have offered, "a sufficient security," don't you cover every single word by inserting "upon such terms, notice, and conditions?"

Mr. POUND. I believe, possibly, I do; but I thought this might make it a little stronger.

Mr. CURRIER. The only addition there seems to be the word "notice?"

Mr. POUND. Yes; that was my particular idea.

Mr. CHANEY. The court would not undertake to do it without giving notice?

Mr. POUND. Well we do get such things, you know, all the time.

Mr. CHANEY. Well, I do not know where. It has not been my experience.

Mr. O'CONNELL. Would not that leave it to the court to say whether notice was required or not? "Upon such terms, notice, and conditions as the court may require."

The CHAIRMAN. Have you ever known a case where the court has directed that this be done without notice?

Mr. O'CONNELL. Not that to be done, but I have known a great many ex parte injunctions to be granted.

The CHAIRMAN. Where they are granted ex parte, is there not always power in the court to hear, upon application of the adverse party?

Mr. O'CONNELL. Yes; but that would leave it open, it would leave it to the court to say whether in a given case notice was necessary.

Mr. POUND. And in the meantime what is to become of our business? Is it to be shut up?

Mr. O'CONNELL. I suggest that you change it, and say "upon notice and upon such terms and conditions as the court may," etc.

Mr. CURRIER. Make it imperative as to notice.

Mr. O'CONNELL. Yes.

Mr. POUND. Most certainly, yes.

Mr. BURKAN. Suppose in the case—

Mr. POUND. Pardon me one moment.

Senator SMOOT. Do you object to the suggestion that the Supreme Court be directed to make the rules for carrying out this law?

Mr. POUND. We do not object to that.

Mr. WALKER. If you will permit me, I will suggest there that I think that is an entirely unwise scheme, because rules will have to be numerous and complex, and the Supreme Court will have no way of inventing them.

Senator SMOOT. That is the reason I asked you if you wished to say anything on that point.

Mr. WALKER. I have not spoken on the subject, and I took this opportunity, with Mr. Pound's permission, to express that suggestion.

Mr. POUND. On page 26, line 10, change the word "may" to "shall."

Mr. CHANEY. So that actions arising under this act shall be instituted in the District, etc.

Mr. POUND. Yes, and omit all of that paragraph after the word "inhabitants."

Mr. CHANEY. Or in the district where the violation of this act has occurred.

Mr. POUND. Yes.

Mr. LEGARE. Why?

Mr. CHANEY. I should think you might damage somebody's chances and make it expensive.

Mr. POUND. No, the publication, I presume, would be held to be—for instance, if some one ordered this roll of music from my client and sent \$1, and this was expressed or mailed and in some way delivered to them, we will say at Honolulu, I take it that the violation of the act would be at Honolulu.

The CHAIRMAN. Were you here the other day when I made the suggestion in regard to a modification of that provision substantially this, "actions arising under this act may be instituted in the district of which defendant or his agent is an inhabitant or may be found." Would you object to that provision?

Mr. POUND. I do not see but what that answers the purpose.

Mr. CHANEY. Well, that was the form suggested the other day.

The CHAIRMAN. It was not offered. It was simply a suggestion.

Mr. POUND. We do not object to any reasonable provision, but we simply do not want to be at the mercy of somebody who will order a one-dollar roll away off at the uttermost limits of the earth and then sue us there. It would cost us more to defend it than it would be worth, and would put us at the mercy of anybody who so chose.

Mr. MCGAVIN. But under your plan it would be an inconvenience to the plaintiff?

Mr. POUND. No; along that line I wish to say that any litigation which arises that is honest and sincere is not going to arise from the mere sale of one of these rolls. It is going to be from some heavy and persistent violation, and that is going to be a matter of much importance. It is going to represent large interests. It is going to be like this litigation that is going on now, where the Æolian Company has furnished the sinews of war for this White Company, plaintiff and appellant in the case on appeal in the Supreme Court, and it makes very little difference to them where that action is fought out. It is only to protect us against these little scattered suits all over the land where some fellow could hold us up for \$50, and it would not

pay us to go and fight it. It would simply amount to paying that fellow tribute.

The CHAIRMAN. Somebody stated the other day, when some gentleman began the discussion of that, that it was not the purpose of the committee to permit a provision in this bill that would authorize the commencement of suits in the Philippine Islands, for instance, or the Sandwich Islands, or at any unreasonable place.

Mr. POUND. That is all we desire.

The CHAIRMAN. And for that reason the committee declined to permit discussion on that question.

Mr. O'CONNELL. Mr. Chairman, may I make a suggestion in regard to the venue of the action, as to whether that covers criminal prosecutions provided for by one section of the act; in other words, whether a defendant who is accused of willfully violating any provision of the act is taken for trial to the Federal district where the plaintiff resides?

The CHAIRMAN. My suggestion was rather in the nature of an inquiry whether that amendment would not satisfy the interests of all concerned, leaving it so that the action might be brought in any district where the defendant is or his agent is an inhabitant or might be found. I think that would cover almost every case.

Mr. POUND. One more remark, Mr. Chairman, and I shall conclude. I approach with some degree of embarrassment now the topic suggested by the chairman a few moments ago as to whether my clients would be content to pay royalty. I believe very frankly that the question should not properly be here, and I want to preface what I am going to say by stating that we believe this entire feature should be eliminated from this bill; that if it is even in contemplation it should be a separate bill, devoted solely to the purpose of musical copyright. But if in its decision of this question the committee reaches that point where it determines that there shall be some royalty here, we ask you then to consider in that connection our argument upon this question on this score of monopoly here, and we ask you not to enact the provisions of this bill as contained in the latter part of subsections (f) and (g,) because we believe they would put us entirely and totally at the mercy of this trust. The proponents of this bill say that any royalty provided for as a royalty would be unconstitutional. The opponents of this bill say the bill is unconstitutional in its present form. Where, then, is the legal provision which can meet the requirements of these two classes of gentlemen, which will meet all demand for royalty, if such there be? Some mature reflection upon that subject prompts me to suggest this proposition. Strike out of the bill the latter part of (f) and all of (g,) and all reference to musical copyrights, and insert this provision—

Mr. CURRIER. Where does that come in—under (f)? I presume it would have to come at the end.

Mr. CHANEY. It would be after (e.)

Senator SMOOT. It would be the proviso of (f,) would it not?

Mr. CHANEY. If he strikes out (f) and (g).

Mr. CURRIER. He does not strike out all of (f). What do you strike out of (f)? What words in (f) do you propose to strike out?

Mr. POUND. Everything after the word "thereof" in the tenth line.

Mr. CHANEY. You propose to strike out all of (f) after the word "thereof," and simply have it read "to publicly perform a copyrighted musical work, or any part thereof?"

Mr. POUND. Yes, my thought being that that has reference to a public performance for profit. For instance, something that would take place in a theater. I do not take it that, as it would then stand, would include the playing of a piece of music on a phonograph in your home.

Mr. BONYNGE. But according to the argument of Mr. Walker and some of the other opponents of the bill, that portion of (f) which you retain is just as unconstitutional as any other part of (f) or (g).

Mr. POUND. Possibly so.

Mr. CURRIER. That is Mr. Walker's claim.

Mr. POUND. I realize that that is so from their standpoint.

Mr. CHANEY. Now you strike out all of (g), do you?

Mr. POUND. Yes.

Mr. CURRIER. And all of (f) after the word "thereof."

Mr. POUND. And insert the following:

*Provided, That the purposes of this act be deemed not to include perforated music rolls for playing mechanical instruments or records used for the reproduction of sound waves, or matrices, or other appliances by which such rolls or records, respectively, are made.*

The CHAIRMAN. That is taken from the English law?

Mr. POUND. Yes; adding to that now this statement, in words or substance:

*Provided, however, That in case the applicant for copyright shall file with his application for such copyright his consent or willingness that the subject thereof may be reproduced on or in records as used in connection with automatic playing instruments in whatever form they may be, upon payment of a royalty of two cents upon and for each and every reproduction thereof, then the copyright thereon granted shall be extended to and shall cover such mechanical reproductions.*

Mr. CURRIER. That gives him the right to reserve altogether the piece of music from mechanical means, so that he does it to all.

Mr. POUND. That would give everybody the same free, equal opportunity. It would give a universal right. Now, let us get at the present royalty that a composer receives. The average has been carefully figured out. Some of my associates can give you the computation by which it is arrived at. That average is found to be something about a cent and a half. I do not mean to say but what there are exceptions where they get more. I do not mean but what some successes go very high; but take all music published, and the average royalty to each composer on each sheet of music has been determined to be about a cent and a half.

Mr. FURNESS. How do you make the calculation?

Mr. POUND. My associates will give the figures if desired. But for the purposes of this suggestion I have computed it at 2 cents, merely as furnishing some criterion to go by. In the case of this one company, whose representative told you to-day that they made 100,000 records a day, you can very well see that those composers whose selections become noted and have a sale will, at almost any price, receive a large income.

Mr. CURRIER. Two cents a day would give \$2,000 a day?

Mr. POUND. Yes; that one firm would have to pay that sum daily for royalties. Now, gentlemen, I am going to conclude, because I feel I should not trespass longer upon your time.

Senator SMOOT. Do you think a royalty of 2 cents on each one of these pieces would make any difference in so far as the retail price to the public is concerned?

Mr. POUND. I think possibly if it is kept down to 2 cents, so far as my clients are concerned, it would not make any difference; no. Of course, any royalty much higher than that would simply amount to the public paying for it. But, gentlemen, our contention is that all we want here and all we do want is simply justice and protection against this proposed monopoly. That is the gist and purpose of what we are here for. We do not want to trespass on any man's rights. We never have done it under the law of the land so far, and we do not want to be turned over to these people and be confronted with such contracts as you have here in evidence and be told that we can not do business because they have a monopoly of all the music published.

Mr. WEBB. Do you know whether this company is the only one that copyrights all of its perforated sheets?

Mr. POUND. So far as I have been able to learn.

Mr. HEDGELAND. I have made a search, and that is the only company with the exception of one more.

Mr. POUND. We did not anticipate this bill. We did not know any thing about it until the June hearing. We were not preparing for this since March, 1902, as the *Æolian* people were.

Mr. BURKAN. Mr. Pound, you stated to the committee that in Germany and in no other country has any such law been enacted which makes a phonographic roll an infringement of copyright.

Mr. POUND. That is my belief.

Mr. BURKAN. Are you aware that the supreme court in Germany decided that a perforated roll was an infringement, and later on a treaty was made with Switzerland, and before Switzerland agreed to go into the treaty and have it signed there was a provision put into it that these perforated rolls shall be exempt from payment of any royalty or from the payment of any price to the composer, and that later on an act was passed in Germany in accordance with that treaty and that in that way that decision was overruled?

Mr. POUND. No, I think you are slightly mistaken about that. I think the decision held that as long as a perforated roll was a mere mechanical reproduction it was not a violation of copyright, but if they manufactured a perforated paper roll and placed it upon the market with a claim that it was a work of art, that it went further than that, that it was from a musical standpoint a masterpiece, then it was subject to copyright. I have here a cylinder such as is made by my clients. You will observe it is about 6 feet long and 18 inches in diameter. Do you want us to file 9,000 of those here, two copies of them? Can anybody read that, or even tell me how many tunes there are there on that roll? There are, in fact, ten on that roll.

Mr. SOUSA. Can I ask if this became a law and I got a copyright on my composition and sold the right to you, if that would protect you without your filing that?

Mr. BONYNGE. What would be the necessity of filing this if the copyright to the composer protected you as against other rolls being made similar to that?

Mr. POUND. Because I believe that this law, especially that part which says "or any material part thereof," would be construed, and justly so, to cover not only the copyright that is obtained on the musical composition, but also the reproduction of it. This melody that is here produced on this cylinder is not in the form in which it is

written for the piano. It is all rearranged. Now, every piano has—how many notes—88?

Mr. SOUSA. That will do.

Mr. POUND. Well, these paper rolls go down as low as 24. It has to be rearranged. I am not very competent to speak on this subject. Of course I understand that the Æolian Company have a theory and claim that their arrangements—their cutting—is a new creation of that melody, and that they are entitled to copyright on that as against all other measures. In other words, that these pieces here—this waltz, for instance—that if they cut it, and rush to the copyright office with it, and file it before we can get there, that that bars us from ever filing ours.

Mr. TINDALE. Can you not make your own "arrangement" and copyright that also?

Mr. POUND. They claim not, and I incline to their belief.

Mr. TINDALE. Mr. Chairman, I represent a highly responsible house in New York City and if this gentleman's company wishes to make Beethoven's music—no matter how the Æolian Company has cut it or not—but if he takes a Beethoven piece, an original composition, and cuts it for his machine, I undertake to say that my house will shield him from indemnity.

Mr. POUND. That is all very nice; but what is going to become of our factory if we should be impounded and closed up for five or six months?

Mr. TINDALE. We will undertake to fight that suit for you if you will use Beethoven's music, except that you must not use the Æolian arrangement.

Mr. POUND. We do not want to do that; but we do not want to be prevented from making our own arrangements. We are capable of making our own arrangements. We have done so in the past. I think that is all.

**STATEMENT OF MR. PAUL CROMELIN, VICE-PRESIDENT OF THE COLUMBIA PHONOGRAPH COMPANY, GENERAL PRESIDENT OF THE AMERICAN MUSICAL COPYRIGHT LEAGUE.**

Mr. CROMELIN. Mr. Chairman and gentlemen of the committee, when I appeared before you in June I was allowed fifteen minutes, and in that time I had only the opportunity to present briefly under various headings representing our reasons for opposing paragraph (g) of the bill. The third heading was as follows:

that the demand for such legislation does not emanate from the great mass of musical authors and composers, nor is it demanded by them; but has been conceived by certain selfish individuals who have conspired together to form and create a giant monopoly, the like of which the world has never known, and the fourth—

I am reading from page 156 of the printed record—

that such legislation instead of being in the interest of composers is directly opposed to their real interests, which is to have the greatest possible distribution of such records as the best means for creating a demand for their sheet music. Abundant evidence of this can be furnished to sustain this fact if desired.

Mr. Currier at that time stated that it was desired, and with your permission I will endeavor to put you in possession of the facts. On

page 59 of the report of the hearings last June are two communications which I desire to read, or rather a portion of them. They are as follows:

JOS. W. STERN & Co., MUSIC PUBLISHERS,  
New York, June 5, 1906.

Dr. D. P. LEWANDOWSKI,  
Care of Raleigh Hotel, Washington, D. C.

MY DEAR DOCTOR: We herewith authorize you to represent us and speak in favor of the copyright bill at the meeting of the committee. Honorable Senator Kittredge, or any other honorable gentleman who will do anything to further the passage of this bill, will earn our everlasting gratitude and will be working for the advancement of an industry which has been sorely oppressed by piracy and injustice.

There is an excellent opportunity now to show fair play to a body of citizens who have been working at a disadvantage and fighting for years for their just rights and for proper and adequate protection from the Government.

With best wishes, we remain,

Yours, very sincerely,

JOS. W. STERN & Co.

To the Committee of the Senate on Patents, Senator Alfred B. Kittredge, of South Dakota, Chairman.

GENTLEMEN: I appear before you this morning in the name and as the representative of the firm of Jos. W. Stern & Co., music publishers, of New York, and in their behalf I wish to state that the bill on copyrights (S. 6330), to amend and consolidate the acts representing copyrights, which is before you this morning, is of the highest importance for the protection of the authors and composers and music publishers, to protect their copyrights.

The old law is very vague and unsatisfactory. The proposed new law would help music publishers and composers very much.

There has been a great deal of piracy going on, and their best "hits" have been copied and pirated.

The new law makes such piracy a criminal offense, punishable by fine or a year imprisonment. If passed, as we hereby most humbly pray that it should be so, it will punish the pirates, because the fine alone can not stop their unjust deeds, and they laugh and pay their fine, but a year of imprisonment will certainly change all for the best. The said pirate would not risk a year of prison at all times.

Then again, the new law provides that no phonograph company or any makers of musical instruments, as well as makers of self-playing pianos, can deliberately use the work of the brain of the composer as well as the property of the publisher without permission to do so or paying some remuneration for the same.

Imagine the injustice of the thing. A composer writes a song or an opera. A publisher buys at great expense the rights to the same and copyrights it.

Along comes the phonographic companies and companies who cut music rolls and deliberately steal the work of the brain of the composer and publisher without any regard for the said publisher's or composer's rights.

They sell thousands and thousands of the "hits" of the publisher, which he has worked hard to make, without paying, as stated before, a cent of royalty for them.

The new law proposed remedies this, but of course the phonographic companies are fighting the new bill tooth and nail.

Very respectfully, yours,

D. P. LEWANDOWSKI, M. D.,  
34 East Twenty-first Street, New York City.

The letter I have just read is written on behalf of Jos. W. Stern & Co., and is signed by D. P. Lewandowski. Now, by way of contrast, permit me to read letters addressed to us by Jos. W. Stern & Co., who are members of the Music Publishers' Association, and judge for yourselves whether we have deliberately stolen the work of the brain of the composer and trampled upon the rights of the publisher as Doctor Lewandowski would have you believe.

JOS. W. STERN & Co.  
New York, December 13, 1905.

COLUMBIA PHONOGRAPH COMPANY,  
Twenty-eighth street and Sixth avenue, New York City.

GENTLEMEN: We beg leave to call your attention to our new big ballad success entitled, "In the Golden Autumn Time, My Sweet Elaine;" also our new instrumental hit, "Priscilla," a Colonial intermezzo and two-step.

The ballad is written by the authors of "When the Harvest Moon is Shining on the River" and "Sweet Adeline," and you will find it as near perfection as any rustic ballad could be.

We mail you two professional and one regular piano copy of the song, also a vocal orchestration and a dance orchestration.

The instrumental number "Priscilla" is by Mr. S. R. Henry, composer of the famous "Polly Prim" and "Peter Piper" marches, of which you no doubt have sold many records.

We mail you two professional piano copies and one regular copy of this composition, also one full orchestration and a full band arrangement.

Kindly look these two numbers over carefully, and, if possible, make record of same at the very earliest possible moment. We are pushing these two pieces very hard and you will undoubtedly have numerous calls for them.

We are particularly anxious about "Priscilla," as this is a crackerjack instrumental piece for all instruments.

Kindly let us hear from you as to what you think of the two publications, and oblige,

Very truly, yours,

Jos. W. STERN & Co.

P. S.—We have had a number of orders from phonograph parlors for the slides of "In the Golden Autumn Time, My Sweet Elaine" (which are ready), but they can not use them until the records are on the market.

N. B.—Please address your reply to Mr. H. R. Stern.

At the same time Jos. W. Stern & Co., members of the Music Publishers' Association, through their counsel, were telling you gentlemen that we were stealing the product of composers' brains, and at that time we were receiving from publishers such letters as this. Here is another from the same company:

Jos. W. STERN & Co.,  
New York, April 18, 1905.

COLUMBIA PHONOGRAPH COMPANY,

Twenty-eighth Street and Sixth Avenue, New York City.

GENTLEMEN: Have you made record as yet of our new big instrumental success "Peter Piper," by the composer of the famous "Polly Prim" march? If not, kindly let us know and we shall immediately mail you full band or orchestra copy or piano solo.

"Peter Piper," although out but a few weeks, looks as if it is going to be the biggest instrumental hit we have had in many years.

Very truly, yours,

Jos. W. STERN & Co.

We received "Peter Piper" and put it on our records, and in addition we published 250,000 descriptions of "Peter Piper" and scattered them all over the United States in behalf of Stern & Co.

Here is another letter directed to Mr. Emerson, chief of our master record department. I am intimately connected with the manufacturing department, and we had given records to Stern & Co. from time to time.

Jos. W. STERN & Co.,  
New York, February 25, 1905.

Mr. EMERSON,

(Care of Columbia Phonograph Company),

No. 57 West Twenty-sixth Street, City.

DEAR SIR: We sent you copy and orchestration of our new ballad success "When the Harvest Moon is Shining on the River" a few weeks ago.

If the cylinder records of same are ready, will you kindly oblige us with a half dozen.

Thanking you in advance, we remain,

Very truly, yours,

Jos. W. STERN & Co.



Another communication received from Stern & Co. is as follows:

JOS. W. STERN & Co.,  
New York, September 9, 1905.

DEAR SIR: Inclosed please find late musical and theatrical notes. On receipt of clipping, we will be pleased to furnish you with copies of songs mentioned therein.

Yours, truly,

JOS. W. STERN & Co.

I will read some of our replies to Stern & Co.

FEBRUARY 16, 1905.

Messrs. JOS. W. STERN & Co.,  
34 East Twenty-first street, New York City.

GENTLEMEN: I have received your letter, in which you request us to list more of your songs. We will take pleasure in complying with your request. Our representative will call on you and you can supply him with such stuff as you want us to list.

Very truly, yours,

V. H. EMERSON,  
Superintendent.

Here is another answer:

FEBRUARY 16, 1905.

Messrs. JOS. W. STERN & Co.,  
New York City.

GENTLEMEN: Replying to yours of February 6, regarding the song "When the Harvest Moon is Shining on the River," I beg to state that we will list this song as requested.

Very truly, yours,

V. H. EMERSON,  
Superintendent Music Department.

Now, we had with us here last June another member of the Music Publishers' Association—Leo Feist, of New York, and he was also present last Friday and Saturday. I am very sorry that he is not with us to-night, as I have in my hand a letter from his house, dated May 18, 1906, about two weeks before we were down here last summer, when Mr. Feist was claiming we were stealing the product of the composers' brains. I don't wonder that my friend, Mr. Sousa, smiles. It is as follows:

LEO FEIST,  
New York, May 18, 1906.

Mr. V. H. EMERSON,  
Care of Columbia Phonograph Company,  
New York City.

DEAR SIR: Replying to your favor of recent date, beg to say that we are sending you under separate cover the full orchestra parts of "Yankee Grit," which we trust you will kindly accept with our compliments.

Very truly, yours,

ABE HOLZMAN,  
Manager.  
Per M. J. G.

Here is another one from Mr. Feist:

LEO FEIST,  
New York, January 12, 1905.

Mr. GEO. EMERSON,  
57 West Twenty-sixth Street, City.

DEAR SIR: Pursuant to your request of a few days ago, I take great pleasure in sending you, under separate cover, one of the first orchestra copies of my new waltz, "Loveland," which I trust will reach you in due season.

Very truly, yours,

ABE. HOLZMANN,  
Manager B. and O. Department.

Mr. BONYNGE. You have not got one from Mr. Sousa, have you?

Mr. CROMELIN. Why, Mr. Sousa is the best phonographically advertised man in the world, and deservedly so. I will now read a letter received from Roth & Engelhardt, New York, manufacturers of automatic pianos.

ROTH & ENGELHARDT,  
New York, December 3, 1906.

Mr. PAUL CROMELIN,  
President Musical Copyright League,  
25 West Twenty-third Street, New York.

DEAR SIR: If we recollect rightly the Automatic Vaudeville Company in Fourteenth street, who run the Penny Arcade there, are being paid by certain music publishers for displaying ads of certain compositions over the automatic piano or piano player which is used to attract the public.

It seems to us that this would amply demonstrate the fact that publishers and composers consider the piano player an advantageous medium to increase the sale of their compositions. If this could be proven it might be a useful point.

Very truly, yours,

ROTH & ENGELHARDT,  
per A. P. D.

Let us proceed with the proof. I have here a communication from my house addressed to me under date of December 3, in regard to a great number of orders which we have received from another member of the Music Publishers' Association, Jerome H. Remick, of New York City:

COLUMBIA PHONOGRAPH COMPANY,  
New York, N. Y., December 3, 1906.

Mr. PAUL H. CROMELIN,  
Vice-President Columbia Phonograph Company,  
1212 F Street NW., Washington D. C.

DEAR MR. CROMELIN: Please find inclosed letters of March 17, 29, 27, April 14 and 26, 1906, from the Jerome H. Remick Company, of this city, and from the Gus Edwards Music Publishing Company under dates of May 12, 28, and June 7, 1906, relative to advance order for cylinder records. We find that a number of orders from the Remick Company have been received, prior to the inclosed correspondence, by telephone, and of which we have only rough memoranda. Our ledger indicates that goods were shipped to them on similar orders from October 24, 1905. Our correspondence prior to that inclosed was destroyed during the recent fire.

On letter of March 17 from Remick Company you will note instructions to ship to the Automatic Vaudeville Company, at 48 East Fourteenth street, this being the largest amusement parlor in the city and one of several controlled by the same company.

Records on these orders were invariably delivered before being offered for sale through the regular trade channels and before the records had been listed in our catalogue. You will note that the orders in each case have been placed by us under the manufacturing number.

Will advise you by to-morrow's mail relative to the other subject suggested at the time of our conversation of to-day.

Yours, very truly,

NEW YORK OFFICE,  
Per R. F. BOLTON.

Mr. BONYNGE. You did not pay anything for that?

Mr. CROMELIN. No; on the contrary, they pay us. Observe the following:

JEROME H. REMICK & Co.,  
New York, March 17, 1906.

The COLUMBIA PHONOGRAPH COMPANY,  
New York, N. Y.

GENTLEMEN: Kindly make us 250 records of "The Little Chaffeur;" also 250 records of "Is it Warm Enough For You." Kindly rush these, and oblige,

Yours, truly,

JEROME H. REMICK & Co.

JEROME H. REMICK & Co.,  
New York, March 29, 1906.

The COLUMBIA PHONOGRAPH COMPANY,  
New York.

GENTLEMEN: Kindly make for us 250 records of "Good-Bye Maggie Doyle" as soon as possible.

Yours, truly,

JEROME H. REMICK & Co.

JEROME H. REMICK & Co.,  
New York, March 27, 1906.

The COLUMBIA PHONOGRAPH COMPANY,  
New York.

GENTLEMEN: Kindly make for us, as soon as possible, 250 records of "Cheyenne."

Yours, very truly,

JEROME H. REMICK & Co.

JEROME H. REMICK & Co.,  
New York, April 14, 1906.

Mr. DEMAREST,  
Care of Columbia Phonograph Company,  
New York.

DEAR SIR: Will you kindly call up Mr. W. A. Forbusch, at the record department, Twenty-sixth and Sixth avenue, and he will explain regarding XP record, M. 630-2, "Is it Warm Enough For You?"

Yours, very truly,

JEROME H. REMICK & Co.

JEROME H. REMICK & Co.,  
New York, April 26, 1906.

The COLUMBIA PHONOGRAPH COMPANY,  
New York.

GENTLEMEN: Kindly have made for us, as soon as possible, 250 records of "Good Advice," 250 records of "The Poor Old Man," and 50 records of "When the Mocking Birds are Singing in the Wildwood."

Your prompt attention to this order will be appreciated by,

Very truly, yours,

JEROME H. REMICK & Co.

Now, gentlemen, what do these orders mean? Why does the Jerome H. Remick & Co., members of this Music Publishers' Association, who claim that we are stealing the product of the composers' brains, use the Columbia Phonograph Company to the extent of ordering from us and paying for 250 to 300 records of every song as soon as they publish it? For the purpose of selling the records? No—absolutely not—but to give them away to the owners of penny arcades in consideration of their putting them on their automatic graphophones, so that the public will become acquainted with the tune and buy the sheet music.

Here is a letter received from my house which will prove interesting:

COLUMBIA PHONOGRAPH COMPANY,  
New York, N. Y., December 5, 1906.

DEAR MR. CROMELIN: Referring to the question of records made for the Jerome H. Remick Company of this city, our Mr. Zeigler called on the Automatic Vaudeville Company to-day, and in course of conversation was told that records which we had furnished to the Remick Company were given to them for use in their various amusement parlors and in order that Remick's publications might be featured in that way. The Automatic Vaudeville Company operates a number of amusement parlors in New York and other cities, and probably used the entire order placed with us by Remick, of 250 of each selection.

We further find that the Automatic Vaudeville Company is featuring selections published by two houses only, the Jerome H. Remick Company and the Helf & Hager Company. Sheet music is offered for sale by the Automatic Vaudeville Company so that the publishers of the sheet music obtain the full benefit of the advertising obtained from use of our records on the slot machines.

From conversation with owners and managers of other amusement parlors we find that they are invariably in very close touch with the music publishers, and are offered inducements from the publishers to feature their publications, either by use of our cylinder records or otherwise.

We trust this information may be of service to you.

Yours, very truly,

COLUMBIA PHONOGRAPH COMPANY,  
By R. F. BOLTON.

Mr. PAUL H. CROMELIN,  
*Vice-President, 1212 F street NW., Washington, D. C.*

Mr. TINDALE. Will you answer a question there?

Mr. CROMELIN. I can not be interrupted now. I will be very glad to answer any questions you may wish to ask later. Here is another letter from a member of the Music Publishers' Association, the Vandersloot Music Publishing Company, of Williamsport, Pa. They write as follows:

VANDERSLOOT MUSIC PUBLISHING COMPANY,  
*Williamsport, Pa., January 8, 1896.*

COLUMBIA PHONOGRAPH COMPANY,  
*New York, N. Y.*

GENTLEMEN: We herewith hand you copies of our great song hit, "Just at the Break of Day." We have had at least twenty-five parties write to us to know where they could get records of this song. Don't you think it would pay you to make records of it?

Sincerely, yours,

VANDERSLOOT MUSIC PUBLISHING COMPANY.

Now, I come to the Gus Edwards Music Publishing Company, of New York City. Gus Edwards is one of the best-known writers of popular songs.

Mr. WEBB. He is not a member of this association?

Mr. CROMELIN. No; he is not. He writes as follows:

GUS EDWARDS MUSIC PUBLISHING COMPANY,  
*New York, May 12, 1906.*

COLUMBIA PHONOGRAPH COMPANY,  
*City.*

GENTLEMEN: Kindly let me know how cheap I can get a phonograph, complete, recorder, and quote price on blank records. On account of mutual interests for your business and our business I should expect a very low price on everything.

Under separate cover I am sending you our latest publications for band and orchestra. Would like you to feature some of them in the very near future. You will find among them some already very popular ones.

Awaiting an early reply, I remain,

Yours, sincerely,

GUS EDWARDS.

Here is another:

GUS EDWARDS MUSIC PUBLISHING COMPANY,  
*New York, May 28, 1906.*

COLUMBIA PHONOGRAPH COMPANY,  
*353 Broadway, New York.*

GENTLEMEN: We have been holding your letter of May 23, as Mr. Edwards has not yet decided as to the purchase of machine, and at present can not tell you exactly as to his intentions, but there is no doubt of his purchasing the outfit for his personal use.

In accordance with the second paragraph of your letter, we are sending you a complete list of our publications to-day, which we would be very glad to have you

forward to your record-making department with view to use, and should be glad to hear from you on this point.

With best wishes, very truly, yours,

GUS EDWARDS MUSIC PUBLISHING COMPANY,  
R. A. BROWNE, *General Manager.*

There is another name on this list of members of the Music Publishers' Association, the Victor Kremer Company, of Chicago. I think that we ought to hear something from our western friends. They write me personally under date of 19th of February as follows:

Mr. WEBB. They are members of the association?

Mr. CROMELIN. Yes. The letter is as follows:

VICTOR KREMER COMPANY,  
*Chicago, February 19, 1905.*

Mr. PAUL CROMELIN, *New York, N. Y.*

DEAR MR. CROMELIN: Our Mr. Thompson has requested us to send you a copy of the song and orchestration of "Will the Angels let me Play?" for the purpose of making records of this number. We intend to use quite a lot of these records, and we are herewith placing an order for 100 records (we understand the price is 25 cents per record) as soon as they are completed.

We thank you very much for your kindness in putting this number in your catalogue. We assure you that this is appreciated, as it has been very hard heretofore for us to get our numbers on records for the reason that we are a Western publishing house. We have a very large catalogue, and are doing a big business, and the people of the West want our publications, and we therefore thank you again for starting our publications on records.

With best wishes, we beg to remain,

Cordially, yours,

VICTOR KREMER COMPANY.

Very apparently they did not want the New York firms to get a monopoly. Then there is another, the Harris Music Publishing Company, who write under date of March 20, 1906, as follows:

HARRIS MUSIC PUBLISHING COMPANY,  
*March 20, 1906.*

COLUMBIA PHONOGRAPH COMPANY,  
*90 West Broadway, New York City.*

GENTLEMEN: We are receiving communications almost daily from trade all over the country, asking why they can not procure records of our songs that we are publishing.

We have sent Mr. Emerson copies and orchestrations of some of our best numbers, and failed to hear anything further in the matter. Our southern representative leaves for the South in a short time, and he is very anxious to have you make records of our best numbers, so that he can inform the trade to that effect, and we earnestly believe that you will have a sufficient business on these numbers to satisfactorily imburse you for your trouble in the matter.

If we can make any arrangement with you whereby we can accept orders for our songs on your records, we will be pleased to hear from you in reference to same.

Hoping you will give this your attention, we are,

Very truly, yours,

HARRIS MUSIC PUBLISHING COMPANY.

We have to very carefully consider the various selections offered in order to meet the popular demand and give the public what they want.

The Thurber Music Publishing Company, of Boston, write as follows under date of May 23, 1905:

THURBER MUSIC PUBLISHING COMPANY,  
*Boston, May 23, 1905.*

Mr. V. H. EMERSON,  
*56 West Twenty-sixth street, New York City.*

DEAR SIR: We have running here two popular songs, which are making quite a hit, entitled "Meet Me" and "Mother," and write to ask if you would not like to have them for your records, as we feel sure that there will be quite a call for them.

We shall be glad to hear from you favorably on this subject at your earliest convenience, and remain,

Very truly, yours,

THURBER MUSIC PUBLISHING CO.  
E. THURBER.

Now, I understand that Sol Bloom is a member of this Music Publishers' Association.

Mr. TINDALE. No; he is not.

Mr. CROMELIN. Oh, I beg your pardon. His name is down. Possibly he is not in good standing.

Mr. BURKAN. He has withdrawn.

Mr. CROMELIN. Under date of New York, April 25, 1906, I have the following letter from S. Clarence Engel:

NEW YORK, N. Y., April 25, 1906.

Mr. VIC EMERSON,  
*Twenty-sixth street and Broadway, City.*

MY DEAR MR. EMERSON: No doubt you will not recognize the signature underneath until I mention the fact that I was connected with Sol Bloom for five years. However, I am now with the above firm, and will feel obliged if you can find it convenient to make an appointment with me to call down and see you some morning to play and sing over one or two of our songs for the purposes of putting them on the phonograph.

Awaiting further word from you, and with best wishes, I am,

Sincerely, yours,

S. CLARENCE ENGEL.

MAY 16, 1906.

Mr. S. C. ENGEL, *New York City.*

DEAR SIR: Replying to your letter of the 25th ultimo, I beg to say that I would be pleased to have you call in to see me any time in reference to the songs.

Very truly, yours,

V. H. EMERSON, *Superintendent.*

Mr. Engel knew very well that Bloom had been sending us out everything, and he thought he ought to get a little representation on our catalogue.

Now, there are other music publishing houses in addition to our New York friends. Here comes a request from away out in Washington, just at about the time the Lewis and Clark Exposition was about to be opened, coming from the Ottis E. Williams Music Publishing Company, as follows:

HOQUIAM, WASH., April 11, 1905.

COLUMBIA AMERICAN GRAPHOPHONE COMPANY,  
*Bridgeport, Conn.*

DEAR SIR: I have mailed you two copies of my late march, ten parts and piano, "The Flyer."

Will ask of your kindness to give it a trial, and if you will record it for me I would be very thankful. It has become very popular in the short time that it has been out, and you will no doubt have calls for it from this part of the country. I am also the composer of the Lewis and Clark Exposition March, which, if 'tis satisfactory to you, I will send it at once, on receipt of an answer. It will be in demand during the fair, as I have it for sale there now.

Answer at your earliest convenience.

I beg to remain, yours, truly,

OTTIS E. WILLIAMS MUSIC PUBLISHING COMPANY,  
*Hoquiam, Wash.*

Then we have another important publishing company, The Barron & Thompson Company, of New York. I wrote to this firm when I received their request to put on the song "On the Pier at Dream-

land" last summer, and asked them: Does the sale of the talking-machine records interfere with your business, or does it help you? It was after the arguments in June, and I received the following reply:

BARRON & THOMPSON COMPANY,  
New York, June 15, 1906.

Mr. P. H. CROMELIN, *New York, N. Y.*

DEAR MR. CROMELIN: In reply to your favor of the 13th, was more than pleased to hear from you. As we have already given arrangements of both our songs to such people as Byron C. Harlan, Arthur Collins, Bob Roberts, and Albert Campbell, we thought that possibly by this time records for these numbers were being made, as we wanted to buy a number for the phonograph parlors through the country.

Our great summer song success, "On the Pier at Dreamland," is being featured by the biggest headliners playing vaudeville, such as Miss Emma Carus, Miss Della Fox, Spook Minstrels, Cooper and Robinson, Miss Flo Adler, Carroll Johnson, and many others of equal celebrity; and our coon song, "Throw Down That Key," is being featured by the Watermelon Trust, Tascott, Tom Moore, and many others. Knowing that the Columbia Phonograph Company was always alive to all the song hits, I wanted to call your attention to the fact that arrangements have been given to these singers.

Regarding your question about the distribution of records interfering with the sale of sheet music or whether it promotes the sale of same, will say that the writer has been selling music for eight years and will be willing to go on record saying that the phonographs have materially helped the sale of sheet music and that I have, especially in small cities, received many orders for music where the dealers have heard the numbers on the records.

The writer is such a great believer in the records that he is willing to buy a quantity and distribute them to the phonograph parlors for advertising purposes.

I wish you would kindly take these two songs up with your record department at once and see if we can not get the songs on in the near future, as the writer wishes to use Columbia records, if it is possible.

Thanking you for past favors, remain,  
Very sincerely, yours,

BARRON & THOMPSON COMPANY,  
W. A. THOMPSON.

The Barron & Thompson Company also wrote me on May 3, 1906, sending this professional copy which I hold in my hand of the song "On the Pier at Dreamland." That is the kind of a copy they send out. In the early days Mr. Sousa sent to us his manuscript and we had thousands of records out and being played long before the composition was on the market. I will say to you further of Mr. Sousa's latest composition, "On to Victory," from the "Free Lance," that the Victor Talking Machine Company had records of and we had records of it prior to the date of its first public performance in New York, and Mr. Sousa had it in his power to prevent us if he wanted to do so very badly. Here is the Barron & Thompson Company letter:

BARRON & THOMPSON COMPANY,  
New York, May 3, 1906.

Mr. P. J. CROMELIN, *New York, N. Y.*

DEAR SIR: We take great pleasure in inclosing our great summer waltz-song hit entitled "On the Pier at Dreamland." This number is already being featured by such artists as Miss Blanch Ring, Miss Della Fox, and Miss Emma Carus.

Mr. Ted S. Barron, the composer, has already written four big hits, and, as this is his best number, wish you would kindly have it put on the Columbia records. We are making you the first inducement. Kindly try it over and see what you really think of it.

Thanking you for past favors, remain  
Very sincerely, yours,

BARRON & THOMPSON COMPANY,  
W. A. THOMPSON.

MAY 5, 1906.

MESSRS. BARREN & THOMPSON COMPANY,  
44 West Twenty-eighth street, N. Y.

DEAR SIR: We duly received yours of May 3, together with waltz song hit "On the Pier at Dreamland."

Thank you very much for the same. We are forwarding the copy to our record department, asking them to try it over and consider the availability for our work.

Yours, truly,

PAUL H. CROMELIN,  
Vice-President.

AMERICAN GRAPHOPHONE COMPANY,  
New York City, May 5, 1906.

DEAR MR. EMERSON: I hand you herewith a communication received from Barren & Thompson Company, and my reply to the same.

Will you kindly give the matter the proper consideration, and oblige,

Yours, truly,

PAUL H. CROMELIN,  
Vice-President.

MR. V. H. EMERSON,  
Superintendent Record Department, New York.

Here comes one from the Frank Wooster Company of St. Louis:

FRANK WOOSTER COMPANY,  
St. Louis, Mo., June 2, 1906.

MR. PAUL H. CROMELIN,  
90 West Broadway, New York.

(Recording Department of Columbia Phonograph Company.)

DEAR SIR: Under separate cover, by to-day's mail, we are sending you one copy for piano and one full orchestration of "The Black Cat Rag."

About the middle of last February one of our salesmen called on you in regard to recording this piece on your machine. He played the selection over for you, together with three of our other publications, viz, "Going Back to the Farm," "The Brownie Rag," and "Cynthia Waltzes." He reported that you would have same arranged for band, make regular records and list them; also that you would have "Going Back to the Farm" sung.

Not having heard from you further in regard to the matter, and noticing that none of these pieces had been listed by you up to date, we thought proper to remind you of your promise to our salesman.

"The Black Cat Rag" is a wonderful seller. It is recorded on the Apollo concert grand, pianola, music boxes, all kinds of electric pianos, etc., and is proving to be a big seller for these various companies. Although "The Black Cat Rag" is still in its infancy, some 18,000 copies have been sold in St. Louis alone, and in other cities in proportion to the amount of "pushing" done in them. At present we are doing everything in our power to make this piece popular and feel confident that within the course of the next two or three months we will have one of the biggest instrumental hits on the market.

Of course we understand that you receive lots of selections to be recorded, and many of them "awfully bum" ones, and we know how you feel toward a new house, but we can assure you that we are in the business to stay and you need not hesitate to record any of our publications.

Thanking you for your kindness in the matter and trusting to receive an early and favorable reply, we beg to remain,

Yours, very truly,

FRANK WOOSTER COMPANY,  
Per FRANK WOOSTER.

Here is one from the Emanon Music Publishing Company, of Philadelphia:

THE EMANON MUSIC PUBLISHING COMPANY,  
Philadelphia, Pa., May 5, 1906.

MR. VICTOR H. EMERSON.

DEAR SIR: We are mailing you copy of our new popular song, "Sweet Elsie Ray," just published, and which we think bids fair to be successful. We would appreciate



very much if you will arrange to have it sung by Mr. Burr or some equally good singer. We have the manuscript orchestration for voice in key of G, which we will forward for your use.

Hoping you will aid us and give "Sweet Elsie Ray" the place it deserves, we remain,

Yours, respectfully,

THE EMANON MUSIC PUB. Co.

P. S.—"Sweet Elsie Ray" is cut for the month of April on "The Angelus," and is being cut by Chase & Baker and the Pianola Company. We have numerous pretty and original compositions, and think we should be represented as well as other publishing houses if meritorious work enters into consideration, as Mr. Justice's compositions are played and programmed by John Philip Sousa, Creatore, and other famous leaders. Kindly let us hear from you.

It does not always happen that these letters come from the musical publishing houses. Frequently they come from unknown composers, who are anxious to shine like our friends, Sousa and Herbert. Here is a communication from a composer, Annie Jack, dated March 26, 1906. Who she is I do not know. She writes as follows:

210 WEST EIGHTY-THIRD STREET,  
March 26.

MANAGER OF MUSICAL DEPARTMENT.

DEAR SIR: If you will kindly make a record of the March of American Miners, I should feel deeply grateful. Hearing one of your valued phonographs we wish to add the new march now being played by bands and orchestras. Many friends also desire to have the record of March of American Miners.

Mr. William Jefferson has it played by the orchestra during 80 productions of the Rivals.

Hoping you will kindly add my march to your records,

Believe me, most respectfully, yours,

ANNIE JACK.

It does not seem to me that it is worth while to bother the members of this committee any more with such letters. I have an abundance of them here, and I want to read only just this one more. It is a communication received from a Washington house, and will undoubtedly prove to be of interest. You all know the firm of Droop & Sons. They have been in business in the city of Washington for the last fifty years. We were neighbors on the avenue when we started years ago the Columbia Phonograph Company. I went in to see Mr. Droop the other night, and I recalled to him the time when he had written a piece of music. How he brought it to us and said, "Can you get the Marine Band to play this, so that we can have it and let the people hear it?" and of our making the record for him. How the record was used to boom the sale of the sheet music. The talking machine was a new thing at that time. He recalled the circumstance very well, and gladly consented when I asked him for a letter to use before this committee, giving the experience of a house fifty years in business, in regard to the effect of the mechanical players on the sale of sheet music.

E. F. DROOP & SONS COMPANY,  
Washington, D. C., December 8, 1906.

MR. PAUL H. CROMELIN,

President American Musical Copyright League, Washington, D. C.

DEAR SIR: In response to your inquiry as to whether or not the mechanical musical player, the Cecilian, pianola, talking machine, etc., have interfered with our sale of sheet music, would say without the slightest hesitation that the result has been quite the opposite.

We know of no better means for increasing the sale of sheet music than by having these mechanical players popularize and make the music known; the more frequent reproduction of the pieces the more likely it is that persons who have the ability to sing or play may want to purchase a score.

As we have been in the music business for the past forty-nine years we know whereof we speak, and you have asked my opinion.

As we are publishers of music as well as one of the most prominent dealers in mechanical players in the city our interests might appear on both sides. But I feel that there would be only one reply, and therefore do not hesitate to have you use this in any way you see fit.

Yours, truly,

E. F. DROOP & SONS COMPANY,  
E. H. DROOP, *Secretary Treasurer.*

Now, gentlemen, I would find difficulty in telling you of all the various schemes that have been contrived by our friends, the Music Publishers' Association and others, to get their works on our records. It has gone to such an extent that attempts have been made to influence our men. I have a communication in my hand—I will not mention, unless the committee wishes me to do so, the name of the house, but here is a letter that comes from the head of our orchestral department, addressed to Mr. Emerson:

In response to your inquiry, will say that the representative of ——— offered me a pecuniary compensation if I would have one or two of their publications recorded and listed in our catalogue.

Very truly, yours,

CHARLES A. PRINCE.

That will be sworn to if necessary.

Now, in connection with the general subject—for the committee wants proof—I call attention to this editorial in the *Musical Age* of November 17, referred to by Judge Walker. I will not take the time to read it, but I will ask permission to have it printed in the record if the committee sees fit.

(The paper referred to is printed at the end of Mr. Cromelin's statement.)

The most important thing that is shown here, however, is that there has been an increase in the last three years of 163 per cent in the sale of sheet music.

Mr. BONYNGE. Within what time?

Mr. CROMELIN. In the last six years. The figures in 1890 of the United States census give the value of the product as \$1,600,000; in 1904, the last census, \$4,147,000. Based on the ratio of increase shown in the Census Bureau figures, the value of the product for 1906 will be over \$6,000,000, or an increase of over 163 per cent in six years.

We claim, gentlemen, that there has been no more potent influence than the talking machine and the piano player and these various mechanical devices in bringing about that increase. It will be interesting to you to know, in that general connection, that our company alone prints every month not less than 500,000 supplements and sends them over the United States, featuring and listing these new musical publications, and I do not believe there is any doubt in the minds of our friends on the other side in regard to the value of our work to them. I only want the committee to have the facts.

Mr. CHANEY. Let me ask you this question: There is not very much doubt but what your theory of this is all right—that all these people want to get their music before the public, and they are seeking every means of advertising it. Now, in this bill, should it pass, is there anything to prevent that continuing, and, if so, what is it that would interfere with it?

Mr. CROMELIN. If this bill passes?

Mr. CHANEY. Yes.

Mr. CROMELIN. Well, if these gentlemen continue to send their pieces to us I see no reason why it would interfere with our business. If they want to send us their pieces and give us the privilege of putting them on, I can not see how that would interfere with our business.

Mr. CHANEY. Yes; that is what I mean.

The CHAIRMAN. Is there any provision of law in this proposed bill that would interfere with it?

Mr. CROMELIN. With our business?

The CHAIRMAN. Yes.

Mr. CROMELIN. Yes, sir; most emphatically.

The CHAIRMAN. I mean with this programme that you have had in the past.

Mr. CROMELIN. Is there anything?

The CHAIRMAN. Yes.

Mr. CROMELIN. We would not be able to get their publications, in all probability; a good many of them would be tied up; we might not be able to get them.

Mr. WALKER. The publishers urge these publications upon Mr. Cromelin now because the Æolian contract has not gone into effect yet, but as soon as the Æolian contract goes into effect the publishers will no longer be at liberty to send these pieces to Mr. Cromelin, and will be under an ironclad contract running for thirty-five years to sell them to the Æolian Company only.

The CHAIRMAN. Judge Walker, suppose that all the fears of you gentlemen are realized in regard to the Æolian Company, what about their violation of the Sherman antitrust law?

Mr. WALKER. They clearly would not be violating that law, because the Supreme Court has decided in an exactly analogous case, in the Dietz-Harrow case, that the Sherman antitrust law was not violated by a similar combination under the patent law. They based that decision upon grounds that are equally applicable to the trade-mark law, holding that where a number of people secure a large number of patents they may combine together against the letter of the Sherman antitrust act, but not violate its purport, because they are proceeding under original monopolies. That exact point was decided in that harrow case, about two years ago, and the point is exactly analogous to copyright litigation. So that if this scheme were carried out exactly as I painted it and the trust were proceeded against under the Sherman law, the suit would fail on the exact ground that it failed in the harrow case.

A GENTLEMAN. Mr. Cromelin—

Mr. CROMELIN. I can not permit any interruptions, Mr. Chairman.

Mr. BONYNGE. I would like to ask you just one question. I am not a musician, but I judge from the title of these pieces that this is pretty cheap music.

Mr. CROMELIN. It is; most of it—yes, sir; pretty bum.

Mr. BONYNGE. Have you had any such requests from composers of higher-class music?

Mr. CROMELIN. Most of these houses that I speak of control the most popular music; and that, as Mr. Dyer said this afternoon, if we depended upon the classical selections, the companies would go out of business. He made the statement that that class of music amounted to about 1 per cent. We are gradually nursing that sentiment. We are gradually teaching the people good music, and I want to say that there is a growing sentiment in that direction for the operatic, espe-

cially the grand opera music. But the proportion of the business compared to the whole is infinitely small, sir.

Mr. BONYNGE. Do you not think the real effect of it is to popularize and to educate the public to this cheap class of music at the expense of the better class of music?

Mr. CROMELIN. No; I do not think so. I have followed this industry very closely, and I have been astonished at the broad dissemination of musical knowledge in the country to-day as compared with ten years ago. I have a clipping here of an interview with Mr. Victor Herbert on that subject that he gave to the newspapers at the time he was here in June, and I think it is generally admitted that this is true. You understand that we appear here not alone for the talking machine companies, but for the various mechanical players, and while it is true to-day that compared to the classical selections, the popular pieces, such as these that I have mentioned here, are very, very much more greatly in demand; it is also true that there is a growing sentiment in favor of the classical selections, and I believe that in course of time, through the agency of these various mechanical machines, the people of this country will have a greater appreciation for the better music. And no agency that I know of is more potent than the aid of the mechanical player and the talking machine.

While standing here I received a telegram from the Farrand Organ Company, of Detroit, Mich. I know nothing about this concern, except that it is a very large concern. Perhaps there are other gentlemen in the room who can tell me more about it; but this was in response to an inquiry that was sent out suggested by Chairman Currier's question as to what would happen if the supply of music were limited. And this house answers:

A limited supply of perforated music for piano players would be ruinous to the industry.

FARRAND ORGAN COMPANY,  
*Detroit, Mich.*

Mr. WALKER. If you will permit me, I am well acquainted with that corporation, and their business consists in perforating sheet music and making piano players operated by that sheet music. They have a very extensive establishment doing that kind of work, and this is fresh testimony that the passage of this bill would be ruinous to their business.

Mr. CROMELIN. This comes in while I am standing here. I got one during the day as follows, from Albert Krell, the president of the Auto-Grand Piano Company. Now, I have only met this gentleman a few weeks ago, and I know nothing about his company, except that I understand it is one of the largest independent manufacturers of the country:

PAUL H. CROMELIN,  
*Care Librarian of Congress, Washington, D. C.*

The limitation in any way of the supply of new music for use on perforated rolls would halt the manufacture of at least 45 out of the 56 automatic playing pianos now being made in this country. No manufacturers would continue to make automatic instruments if the supply of music rolls was in danger, any more than a gun manufacturer would continue to make guns if the supply of ammunition was exhausted. The free and unhampered manufacture of music rolls is as necessary for the public welfare as is the freedom of the press. In my opinion every effort should be used to incorporate in the coming bill a clause specifically exempting all mechanical reproductions of music from copyright interference.

ALBERT KRELL,  
*President Automatic Grand Piano Company.*

Mr. O'Connell hands me one that reached him, that came to the Library after dinner to-night:

NEW YORK, N. Y., December 10, 1906.

J. J. O'CONNELL, Esq.,  
Care Librarian of Congress, Washington, D. C.

In reply to Congressman Currier's question, what effect it will have on musical instrument manufacturers if supply of music is limited, the unanimous answer of our members is this: It will destroy the player business and will involve us in the loss of the immense sums we have invested. It will nullify the rights which we now have under our patent laws, and will put the whole American public into the hands of a monopoly.

J. WINTER,  
Chairman of Executive Committee, Player Manufacturers' League.

Mr. Winter is the chairman of the executive committee of the association that Mr. O'Connell represents.

I received a telegram from the Connorized Music Company, of New York, as follows:

NEW YORK, December 10.

PAUL H. CROMELIN,  
Care Library of Congress, Washington, D. C.:

The principal product of our factory is a perforated paper roll, covered by United States letters patent. We have invested large capital in our business and plant, with the foreknowledge that in the pursuit of our business we have violated no laws. If the supply of new music should be limited, it would ruin our business.

CONNORIZED MUSIC CO.

Gentlemen, I have no interest in the piano-playing business, not to the extent of \$1, and I know very little about it. I am simply referring you this as their testimony as addressed to me.

Here is a communication from the Austin Organ Company:

HARTFORD, CONN., December 10, 1906.

PAUL H. CROMELIN,  
Care Library Congress, Washington:

The industry would certainly suffer. To what extent it would be very difficult to say.

AUSTIN ORGAN CO.

The Automatic Musical Company, of Binghamton, N. Y., telegraphed me to-day as follows:

PAUL H. CROMELIN,  
Care Librarian of Congress, Washington, D. C.

If the supply of available music for our instruments was in any manner decreased our business would suffer very materially, as at the present time the supply does not meet demand for new rolls.

AUTOMATIC MUSICAL CO.

I submit these for what they are worth. This is in answer to the question that Mr. Currier asked yesterday, and probably other replies will come in during the night or the morning.

The question has been asked, What is the size of this industry that is going to be affected adversely by this legislation? I have here sheets from the Music Trades of September 18, 1906, in which reference is made to the census report showing that the piano-playing houses of the United States, and the ones that are directly affected by this, without regard to talking machines, have a total capital of \$56,000,000.

Now, gentlemen, I think it requires no reasoning, no argument, to show that every piano manufacturer in the United States is vitally

interested in what you do with this bill. The demand for a player piano is growing at such a rate that it will be absolutely necessary and essential for them to have it if they are going to compete, if they are going to stay in the business. I speak as a business man. There are about 40 or 50 manufacturers now, and many of the houses that are not to-day making players are preparing to do so. If you pass this law you will absolutely cut them out from that business. They can not possibly get in, as the Æolian Company will control the perforated roll business.

Mr. CHANEY. That question as to whether it will or not is to be considered, you know.

Mr. CROMELIN. Yes; I think you will consider it well, Mr. Chaney.

Mr. BOWKER. That is exactly what we heard in 1891 from the book people, Mr. Cromelin.

Mr. CROMELIN. I will be very glad to talk to you a little later, Mr. Bowker.

Now, gentlemen, you are about to pass a law international in its effect. That is, you can not consider this subject of copyright from a national standpoint. You have got to look at it and view it from an international standpoint. The subject has been so thoroughly covered that I will detain you but a very few minutes on that particular branch. It is with a view of showing you what has happened in France under the decision of one or two years ago, referred to by Mr. Dyer this afternoon and at the risk of losing my chance for an extension of time, and tiring the committee, I am going to read a communication received from our assistant general manager in London, England, Mr. M. Dorian, a man who was in France at the time the adverse decision was given.

The decision, which has already been referred to, and is in the record, was this: That a record of the words of a song with music was violation of the copyright; a record of the music itself was not a violation of the copyright, a most extraordinary conclusion to reach, because there has been no poet, author, or other literary person here asking for the protection granted under paragraph G. All the demand comes from the publishers and one or two musical composers. But in France it has been held that the reproduction of the words alone, whether it be a song or whether it be the spoken word of a copyrighted selection, is a violation of the copyright.

Now let us see how that has worked out:

COLUMBIA PHONOGRAPH COMPANY,  
89 Great Eastern Street, London, E. C., July 19, 1906.

DEAR MR. CROMELIN: Inclosed find copy of a letter I am sending Mr. Cameron and which you may find some use for. It was prepared at his request. It deals only with the situation in France. You are already familiar with the futile efforts made in Belgium, Germany, and England.

With kind regards, sincerely, yours,

M. DORIAN.

This letter is addressed to our Mr. S. T. Cameron, who appeared before your committee last June, and who is detained at Cleveland, Ohio, on a case, and for that reason is not here:

JULY 19, 1906.

S. T. CAMERON, Esq.,  
620 F Street NW., Washington, D. C.

DEAR MR. CAMERON: It may be of some assistance to you to know how the copyright law, as applied to talking machines, has operated in France since the decree of

February 1, 1905, by which the court recognized the right of the music publishers to tax talking-machine records. The decree in question is based upon a very old French statute. The provisions of this statute, which are drastic, were modified by a later statute enacted after a treaty with Switzerland. This amendment exempted all instruments which reproduced music mechanically, and was meant to take Swiss music boxes and similar instruments out of the purview of the original statute. Of course the talking machine was unknown at the time these two statutes were enacted.

When the case was argued in the French courts the attorneys for the talking-machine manufacturers contended that the amendment to the original statute clearly covered talking machines because they are purely mechanical, and although not specifically mentioned are undoubtedly entitled to the same privileges as the other mechanical reproducers of music. The argument is undoubtedly sound, but the court, probably in a spirit of compromise, admitted its pertinency in part only. That is to say, they held that where music only was reproduced it did not constitute a violation of the statute, but where words, as of a song, were also reproduced, the words were an infraction and must be treated as an infringement of the publisher's rights.

It is difficult to understand how they arrived at this conclusion. It is believed that their decision will be reversed when the appeal now pending is heard.

The decree, which is executory, i. e., became operative at once notwithstanding the appeal, made it possible for the music publishers to harass and threaten the manufacturers of talking-machine records throughout France and her colonies. Their first move, through their agent Vives, was to demand large sums of money from the manufacturers as indemnity for past infringements, that is to say, from the date of first filing of their suit to the date of the decree.

I want to say there was a situation there quite akin to this. Vives undertook to try that case out, and he was going to get a percentage in the event that he won, in the same way that the Aeolian Company are going to try that case out, and they are going to be relieved of all responsibility at first—but God help the other fellows—and are going to have a monopoly in the future. (Reading:)

Their first move through their agent, Vives, was to demand large sums of money from the manufacturers as indemnity for past infringements, that is to say from the date of first filing of their suit to the date of the decree. These demands were accompanied by threats of drastic measures to enforce the same. The result was a panic. All of the establishments engaged in the manufacture and sale of records were closed tight, and business entirely suspended. One large concern, Pathé Frères, employing a small army of workmen, closed down for more than a week at an enormous loss to the company and depriving their workmen of their livelihood. In the interval the heads of this concern were in daily and almost hourly conference with the music publishers, and were finally forced to pay a large sum (£100,000) before they could feel safe in resuming operations. Some of the threats made by the publishers were that they would seize matrices and moulds and the visible stock of records; that they would place a sheriff in each store; that they would confiscate records and machines in the hands of the manufacturers and their dealers, etc. Notices and warnings were sent to prominent dealers to the effect that they would be proceeded against if they offered for sale any records not authorized by them, the publishers, and copies of these warnings were served upon the manufacturers as additional coercive measures. The publishers demanded the right of placing one of their representatives in the establishment of each manufacturer to audit the accounts for the purpose of verifying the statement of sales, etc. Before they would furnish labels to be affixed to the records they demanded that they be furnished with sworn statements showing the quantity of records sold during the period (six years) for which they claimed indemnity.

Some of the manufacturers complied with all of these demands, and their compliance only resulted in fresh and still more burdensome demands. One or two large concerns refused to have their operations controlled in this manner, although some of them, in order to obtain a provisional supply of labels with which to resume operations, signed a contract waiving their right of appeal and recognizing the rights of the publishers not only in France, but in other countries as well, even in countries where no copyright law existed. Those who refused to so bind themselves were singled out for every species of petty annoyance which the fertile brains of the publishers could devise.

In addition to the above exactions the publishers notified the manufacturers and dealers that, notwithstanding the decision of the court that records of orchestra or band selections did not infringe, labels must be affixed to these also, and that failure

to comply would involve further measures of coercion. Blackmail, pure and simple, because the language of the court did not leave room for discussion. Some of the manufacturers complied even while complaining of the injustice, because, as they thought and said, they could not afford to resist. Others took the matter into court upon a motion to have the court construe its own decree. When the motion was called the publishers, by their attorneys, said they must admit that there was no room for argument and must concede the point. The motion was therefore not argued, and the court passed no order, the admission of the music publishers disposing of the point definitely. The annoyance and expense imposed upon the manufacturers, however, was just as great and quite as unjustified as anything could well be. It shows conclusively the spirit manifested by the monopoly.

At the time the original decree was announced by the court the full text was published in all the principal papers in the country. In addition all of the manufacturers printed at their own expense circular letters analyzing the decree and pointing out the need for labelling all records before offering them for sale. These letters were sent to every dealer. Their contents were well known to the publishers. In every instance they contained, in one form or another, a warning that the manufacturers would not accept responsibility for any records not labeled, and offering to label any records returned to them or to send the labels to the dealer to be affixed by him if a proper demand were made for them.

The language of the decree imposed a penalty only on those records which should be "published and sold," and the warning of the manufacturers went further than was necessary, but this was because they wished to place their dealers on the safest ground. The liability, if there should be failure to label, would be with the dealer.

Notwithstanding these precautions, the publishers, through their paid spies found in some remote points records which were not labeled. In some cases they were old wornout records which had been taken in exchange by the dealer and were not intended for sale; in fact were unsaleable. In other cases the dealer made it a practice not to affix the labels until the records were actually sold, they remaining in his shelves unlabeled until sale. The publishers seized all such records, and then made a demand upon the manufacturer whose mark they bore for a penalty, and where this was refused sent him threatening communications. In one case the manufacturer was a foreign company, and an attachment was laid upon its bank account on the pretext that it, being a foreign corporation, could close up its business and remove its assets, etc. To release the funds this company was forced to invoke the aid of the courts and to employ expensive counsel. The court, on hearing the facts, quashed the attachment on the ground that it was ridiculous, as the manufacturer could not be held responsible for the failure of a dealer to label his records.

The next move of the publishers was to require that all records, reserve stock, as well as dead stock, be labeled before being placed in the house; that it made no difference that the records were stored in a separate part of the premises from the sales room. This meant that if a dealer had any reserve stock he must label all of it without regard to whether a certain per cent of it might never find a buyer. Aside from the hardship it imposed upon the dealer with a small working capital, it was in direct conflict with the terms of the decree, which imposed the labels only in case of sale. The publishers were, of course, fully aware of this, but counted upon the dealer being unwilling to go to the expense of contesting the matter. It was a case of bulldozing the timid dealer into buying a much larger number of labels than he actually required. Most of them complied. Some others went through their stocks and destroyed thousands of records which were slow movers rather than spend money in labeling those which in all probability would never be sold. There are, on the shelves of dealers in France, thousands of records bearing these labels which will never be sold, and in most cases the money which they represent was filched from people who were too poor to employ lawyers to protect them.

The principal counsel for the music publishers when the case was present before the court was an eminent lawyer and politician who is now a member of the present French ministry. He had a greater interest in the case than his mere fees—that is to say, he was a partner with the publishers in the speculation, and he apparently continues in that capacity.

Soon after his confirmation as a minister he secured an official order from one of his ministerial confreres addressed to the customs officers throughout France, instructing them to seize at the customs-houses any records coming in which were not labeled. As all disk records sold in France, with one exception, are manufactured outside of France, it makes it necessary for the makers to label the records at the factory. As the affixing of the wrong label is held to be no labeling at all there is opening for endless trouble and expense, all of which redounds to the benefit of the



French concern which has arranged matters with the publishers. Different labels have been devised for different publishers, and the maker or dealer must see to it that he does not put "A's" label on "B's" composition, etc., under penalty of seizure and fine.

From start to finish the publishers have used the law to gouge and to harass. It is true all these things have occurred in France, but human nature is much the same throughout the world, and there can be no guarantee that much the same methods will not be applied in America, especially when it is considered that the same people who are profiting by the monopoly in France are the prime movers in the American agitation, and already have in their possession signed contracts giving them control in the event of the passage of a law such as has been proposed. The existence of such contracts is an open secret on this side, although it would probably be difficult of proof.

Hoping this frank statement of what is happening in France may be of service to the committees of Congress and yourself,

I am, sincerely, yours,

M. DORIAN,  
*Assistant General Manager.*

The CHAIRMAN. Mr. Cromelin, you have already occupied at least fifty-five minutes, and that leaves Mr. O'Connell less than thirty minutes if we insist upon a strict limitation of the time.

Mr. CROMELIN. Senator, I leave it entirely to you; but I sincerely trust that you will give us an opportunity to present our case in its entirety. Paragraph (g) is the only portion of the bill which is revolutionary in its character. It sets up property rights that do not now exist, which no government has ever attempted to recognize by legislative action before. I would like to have an opportunity to show you the situation in Germany, that our friend Mr. Burkan has referred to, because the situation is intimately connected with the one here. The Choralian Company (the Æolian Company under the name of the Choralian Company) has obtained a monopoly in Germany, and if you care to go into that I will be very glad to put myself entirely at your disposal.

Mr. O'CONNELL. Mr. Chairman, Mr. Cromelin might, perhaps, accede to this suggestion. I understand that you have set apart a possible thirty minutes in the morning for Mr. Mauro, who is his patent counsel, counsel for the Columbia Phonograph Company. The time having been taken now which, perhaps, belongs to me, if Mr. Cromelin wishes to continue, why not let him take the time of his own counsel, and give me the thirty minutes in the morning which his own counsel would have had?

Mr. CROMELIN. I am perfectly willing to do that, Mr. O'Connell, if it is agreeable to the committee.

The CHAIRMAN. What is the name of the gentleman you mention?

Mr. O'CONNELL. Mr. Philip Mauro.

Mr. CURRIER. Do you mean that he does not want any time?

Mr. CROMELIN. Well, I will ask permission to file a brief and have Mr. Mauro file a brief, if you say so.

The CHAIRMAN. When we began this branch of the case, it was distinctly stated by you gentlemen that five hours was all that you would require, and in order to make sure that you should have that time, at some inconvenience to ourselves, we consented to the evening session.

Mr. CROMELIN. I appreciate it, Senator.

The CHAIRMAN. And it was distinctly stated, further, that you gentlemen should divide that five hours in such manner as you saw fit. Mr. O'Connell is already limited, if we strictly adhere to that rule, to twenty-five minutes. Now, as I stated this afternoon, we can not expect when we report the bill that it shall meet the approval of all

you gentlemen, but we do want you to leave these hearings feeling that this committee has given you a fair opportunity to present your case, and I do think that giving you five hours was quite generous on our part.

Senator SMOOT. Mr. Chairman, let me suggest that there have been a great many interruptions. Mr. Johnson took quite a time in making a speech in this five hours. Why not let Mr. Cromelin go on, say for ten minutes more, and then let Mr. O'Connell go on until twenty minutes past ten and he will have his thirty minutes? I am perfectly willing, as far as I am concerned, to sit here until that time.

Mr. CURRIER. I will do that. Let him have ten minutes and then give Mr. O'Connell thirty minutes.

The CHAIRMAN. Will that be satisfactory to you?

Mr. CROMELIN. I will do the best I can, Senator; thank you very much.

The CHAIRMAN. Very well.

Mr. CROMELIN. Now, gentlemen, reference has been made to the situation in Germany, and I would like to read an extract from a letter sent to me by Mr. Alphonse Melzer, formerly manager of the Phonola Company, Leipziger-Strasse, Berlin, the Phonola Company being a competitor of the Æolian Company. This is a letter dated Berlin, Germany, October 30, 1906:

PAUL H. CROMELIN, Esq.:

The pianola people took advantage of being the first in the market, securing in most instances monopoly contracts with music publishers all over Europe. Thus other manufacturers of piano players must buy the perforated rolls from the Æolian or, in Germany, "Choralian" Company, or pay them a high percentage bonus for their graciously condescending to sell license stamps to other makers. If they choose they need not sell either music rolls or stamps to other makers. Thus the matter stands which you wanted to know.

I merely mention this as bearing upon the general subject. The German law of 1901 was passed one year after a decision had been rendered in the supreme court of Germany declaring that a record of a modern sheet of music was a violation of copyright. It took Germany less than one year to swing around and pass a new musical copyright law making all mechanical musical instruments free. But there was a peculiar wording to that law; there was an addition made; nobody understood what it meant. The wording was as mysterious and as difficult to understand as many of the paragraphs in the bill under consideration.

The sale of disks, plates, cylinders, strips, and other parts of instruments which serve mechanically to reproduce musical compositions is permitted; but the law prohibits the use of perforated music sheets in instruments "by means of which the composition can be reproduced in the manner of a personal performance in respect to the dynamics, duration of tone, and in respect to the tempo."

I was manager for my company at the time, and I thought, of course, that was an attack on talking machines. We got all the business interests together and went to members of the Reichstag to know what that meant. It is customary over there for the minister of justice to expound the law before the third reading, if there are any questions requiring explanation; and he made a statement in the Reichstag to the effect that that was not intended to cover the talking machines, but that was intended for those piano playing rolls where by any possibility there could be what might be considered a personal interpretation of the work of the composer. We were satisfied if it did not

affect talking machines. We did not understand at the time what was up. But after the bill became a law we discovered that the Æolian Company, which was well established in Germany at that time under the name of the Corolian Company, had contracts (as has been stated by the manager here) with practically all the music publishers; and during that time and since that time they have had the whole industry in their hands, and nobody else can make perforated rolls without coming to them and paying them their tribute.

The French law contains an express provision that perforated music sheets shall not be deemed infringements of copyrighted musical compositions.

Mr. WEBB. What evidence have you that the Æolian Company is the same as the Corolian Company?

Mr. CROMELIN. Only the statement of the manager of the competing company. It frequently happens that the name of the company is different in other countries. Our company is the Columbia Phonograph Company M. B. H. in Germany. Under the German law we had to organize separately.

Now, reference has been made to the Æolian contract; and when Mr. Cameron was here last summer he suggested that a similar scheme was perhaps on foot, and especially in view of the fact that a representative of the Victor Talking Machine Company stood here and declared that he was in favor of the bill. It seemed to be rather an extraordinary situation, and Mr. Cameron suggested that a similar scheme was perhaps being hatched; Mr. Pettit arose and stated that that was absolutely false in so far as it related to the Victor Talking Machine Company. Now, gentlemen, I submit to you that such contracts as those are not usually shouted from the house tops, and it is extremely difficult to get any proof on the subject. We never would have known anything about these Æolian contracts had it not been for the White-Smith case. They had to be introduced in evidence there. Permit me to hand in this affidavit.

STATE OF NEW YORK,

*City and county of New York, ss:*

Paul H. Cromelin, being first duly sworn, deposes and says:

I am one of the vice-presidents of the Columbia Phonograph Company (General) and a director of the American Graphophone Company, and appeared before the joint committee of Congress on behalf of these companies on Saturday, June 9, 1906, in opposition to the proposed new copyright bill. After the hearing I had luncheon in the café in Willard's Hotel in company with Mr. C. S. Burton, of Chicago, Mr. Howlett Davis, a brother of Mr. Davis, Mr. Shelton T. Cameron, and Mr. Hedge-land, of Chicago, an inventor of music perforated rolls. As I was taking luncheon, Mr. Burkan, attorney for the music publishers, who also appeared before the committee, came over to my table and stated that Mr. Victor Herbert would like to meet me, whereupon I proceeded to the table where Mr. Herbert, Mr. Servan, counsel for the music publishers, a Mr. Hughes, Mr. J. Witmark, Mr. Leo Feist, and Mr. Burkan were sitting. Mr. Herbert said that he was much interested in the demonstration of the telegraphone records which I had made before the committee and asked me to explain the instrument, as he had never heard of it.

After I had explained the operation of the telegraphone, I entered into a discussion of the merits of the proposed copyright bill with these gentlemen. In the course of this conversation we spoke of the Æolian contracts and the monopoly which would result if the bill became a law, and I said that Thomae, of the Victor Company, would not deny that he had been around endeavoring to close contracts with the publishers during the time the bill was being whipped into shape at the so-called copyright conferences which he attended. Mr. Burkan interrupted me to say that "there was nothing exclusive in the Victor contract; that he (Burkan) had drawn the contract for Mr. Thomae, of the Victor Company, and that he would show it to me if I would

give him my word of honor as a man that I would not use it against him or the Victor Company at the hearing before the committee." In making this statement he made a motion as though to get some papers out of his inside pocket, but I immediately stopped him and said to him that he had better not show me the papers and that I would not give him my word of honor not to use the same against the Victor Company, as I proposed to make use of all of these facts before the committee.

PAUL H. CROMELIN.

Sworn to before me this 20th day of June, 1906.

[SEAL.]

ELISHA CAMP,

*Notary Public, New York County.*

Mr. Thomae was a representative of the Victor Company at the conferences, and has since been drowned, last summer.

Mark you, Mr. Pettit had stood up here. I do not say he made a false statement—perhaps he did not know—but he stood up here and said it was absolutely false in so far as the Victor Company was concerned.

I know nothing about the contracts, gentlemen, except that the counsel for the Music Publishers' Association made this statement in the presence of five gentlemen (and I swore to it because I thought it was important. I went out and made an affidavit to it) confirming the claim that there was a contract in existence, and Mr. Pettit stated here that in so far as the Victor Talking Machine Company was concerned no such contract existed.

Mr. BURKAN. You had better get——

Mr. CROMELIN. Excuse me just a minute.

Mr. BURKAN. You asked me——

Mr. CROMELIN. I will not permit an interruption. Now, just sit down, Mr. Burkan. I will answer you a little later.

Now, gentlemen, I would like to submit, in closing, this: It makes absolutely no difference whether any contracts are in existence or not. It is not necessary for a man to contract with himself. You can not forget that James F. Bowers, president of the Music Publishers' Association, is the same James F. Bowers who is a member of Lyon & Healy, distributors for the Pianola and for the Victor Company. You can not forget that Mr. George W. Furniss, the secretary of the Musical Publishers' Association, is the same George W. Furniss of the Oliver Ditson Company, eastern distributors in Boston, for the Victor Company. You can not disassociate Mr. James F. Bailey, of Washington, D. C., the secretary of this association, from Mr. James F. Bailey of John F. Ellis & Co., of Washington, distributors of the mechanical instruments themselves. You can not forget for a moment that Thomas Godwin & Bro., of Texas, in all the big cities of Texas, members of the Music Publishers' Association, are the same Thomas Godwin & Bro. who are the distributors for the Victor Company in the State of Texas. You can not forget that Sherman Clay & Co., of San Francisco, Cal., members of the Music Publishers' Association, are the same Sherman Clay & Co. who are the western distributors for these companies. And I say to you in all earnestness that it is not necessary for a man to contract with himself. What is going to happen to the other fellows in the event you make this bill a law? If these men, as they claim they do, control nearly all of the big music publishers in the country but two, is it not the most natural thing that they will reserve to themselves and give to themselves the exclusive right to use these copyrighted selections upon those instruments which they themselves control?

It is not important at all whether certain contracts are in existence. If this bill becomes a law, the fact is, gentlemen, that the monopoly will be completed, and it will be completed within a very short time after the law has gone on the statute books.

I will not take any more of your time.

Mr. CURRIER. Just one question: If there should be a royalty of 2 cents, would your company be forced to advance the price?

Mr. CROMELIN. Absolutely, sir. Do you want to know why, Mr. Currier?

Mr. CURRIER. Yes.

Mr. CROMELIN. I will tell you why. It is purely a business proposition. In the first place, if there was a royalty of 2 cents, the public would pay the royalty. You all know that. The company would never pay it. The public have paid the royalty in France, and they did not pay merely the royalty, they paid more than the royalty. We have 150 retail stores. We have to arrange royalties on the sale of certain of our records with singers. David Bispham, for instance, comes to us and sings, and we give him, say, \$1,000, and we say, "We will give you 10 per cent royalty in addition on the sale of the records." Now, it will cost another 2 cents to book and keep the accounts of this royalty in 150 stores, where you are putting out thousands of records and have to separate and keep account of each one sold. The public will have to pay for the booking. The company is not going to do it. When you get down to the actual carrying out of the law, the public will have to pay every time.

All of the features of this bill are of vital interest to us. This custom-house question, which was brought up by Mr. Montgomery, is of greatest importance to us.

I will not bother you any more, except to bring to your attention section b of paragraph 8. Section b of paragraph 8 gives to the foreign composer substantially the same protection that it gives to the American composer, provided the country in which said foreign composer resides gives to citizens of the United States substantially the same protection it gives to its own citizens, or substantially the protection given under this bill.

Now, Mr. Chairman and gentlemen, there is no country in the world that gives substantially the same protection that is given under the bill; and what will the result be? In the event that you pass this bill, you are going to tax the American people for the benefit of a lot of foreign composers and music publishing houses abroad, many of whom are behind this bill, and are waiting to see what action you are going to take. You will ask me how, in what way. Why, in this way: We are in business in Berlin, Germany. We are manufacturers. Under the laws of Germany, say, we will take a record of a piece by Paul Linke—a waltz song from Frau Luna. Germany permits me, by express statute, to make it, and I sell it all over the Empire. I send it to England, and sell it all over England and all over the rest of the world. But when I knock at the doors of the United States I am stopped at the custom-house. If you make this bill a law, what is going to happen? Paul Linke, when he takes out his German copyright, will also take out an American copyright.

The American statute, which it is proposed that you shall pass, gives to Paul Linke, in addition to the right to print the staff notation, also a new right of property in the mechanical reproducers; and the official

of the custom-house, looking over his list, says: "No; you can not bring that in here without first getting the consent of the foreign copyright proprietor." We get the consent of the foreign copyright proprietor, and how? He will say, "Yes, I will let you play it in the United States if you will pay me a royalty of 10 per cent or 20 per cent." If you admit the right to tax, you admit the right to confiscate. If you admit the right of that foreign composer to make the people of the United States pay 5 per cent more, you admit his right to tax them 50 per cent—or as Frau Wagner did; she tried to keep the people of this country from hearing "Parsifal." Mr. Conried took the bull by the horns two years ago, and he put on "Parsifal." Prior to that, only a few rich people could go over to Beyruth, in Germany, every summer and hear "Parsifal." Now you are going to extend this public performance feature to its broadest limit. You can not possibly pass this bill in its present state without taxing every American boy and every American girl who wants to hear the best in music, not for the protection of the American composer, but in order that some foreign publishing house that has the copyright may exact tribute from the people of the United States.

I do not believe that is the purpose of you gentlemen to do it. I trust that you will not.

Is my time up?

The CHAIRMAN. You have now spoken an hour and fifteen minutes, Mr. Cromelin.

Mr. CROMELIN. I thank you very much, gentlemen, for the attention you have given me.

Mr. SOUSA. Just half a minute. I do not understand what Mr. Cromelin meant by advance scores of mine.

A MEMBER. Well, you have taken issue with him on that.

Mr. BURKAN. Mr. Chairman, will we not have an opportunity to reply to some of these charges? I have been charged here with having contracts in my pockets under which I was given a monopoly. It seems to me that this record is full of charges like that, and that I ought to have a chance to reply to some of them.

Senator SMOOT. You say it is not so; do you?

Mr. BURKAN. I say it is absolutely untrue; and moreover, if I had had a contract of that kind, he would want to see it. He would not tell me not to show it to him; he would have been mighty anxious to have me show it to him.

Mr. CROMELIN. I have sworn to that affidavit, gentlemen.

HERALD SQUARE HOTEL,  
New York City, December 6, 1906.

Mr. PAUL H. CROMELIN,  
President American Musical Copyright League,  
Care of the Columbia Phonograph Company,  
1212 F street NW., Washington, D. C.

DEAR SIR: As a member of the American Musical Copyright League I desire to protest through you most vigorously at the coming copyright conference against any law which may be proposed specifying that the composer will have the right to charge a royalty on compositions when mechanically reproduced, even though such a law would provide that all firms in respect to the royalty should be placed on the same basis. Our reasons for protesting are based on the fact that we have been granted numerous patents under the existing patent laws. Unquestionably the value of these patents would be adversely affected in the event of rights now belonging to us are made subservient to the rights of the composer.

I think, should such a clause be proposed, you should ask the committee how about rebates and in what manner do they propose to regulate the composer so

that he will be compelled to see that all inventors are treated on an equal basis. My company is one of the largest independent manufacturers of player pianos in the world, and I, as a player man, feel strongly opposed against measures which will retard the growth and development of this industry.

Very truly, yours,

THE AUTO-GRAND PIANO CO.,  
Per ALBERT KRELL, *President*.

The following is the article from the "Musical Age" referred to during Mr. Cromelin's remarks:

[Paul H. Cromelin in the Musical Age.]

#### REVIEWS THE SITUATION.

There has been more or less agitation on this subject for the past several years, originating, I believe, in Europe, with a view to protecting the so-called rights of the authors and composers in so far as mechanical reproduction is concerned. In 1900, in Germany, a case reached the highest court in which this question was involved: Whether or not the manufacturer of a mechanically-played instrument using a steel disc interfered with the copyright laws of the land as then understood. The case went against the manufacturer, and I believe that the amount of damage assessed was something like 30,000 marks. Immediately thereafter, as the ruling seemed to be against public sentiment, a movement was started to pass a new law which would make it possible for manufacturers of mechanical musical instruments to have perfect freedom in the use of all copyrighted pieces. That law was passed in 1901 by the Reichstag. Prior to its passage the talking machine industry became alarmed at a very innocent little clause that was added to the bill, which seemed to be directly aimed at their interests. As I recollect it, translated, it reads something like the following:

"That the right of perfect freedom of reproduction is granted to all mechanical instruments except those where the exact time and personal interpretation of the piece could be considered as embodied in the mechanical instrumental playing."

#### THE RESULT IN GERMANY.

Nobody knew what that meant, so we called a meeting in Berlin, at which the Gramm-Gramophone Company, the Columbia Company, and all the German companies were represented, with a view to having that clause defined and with a view to removing the string in so far as the talking machines were concerned. We succeeded in getting the minister of justice, prior to the third reading of the bill, to interpret the law for us. You know it is customary there to interpret the law before a bill has been enacted by having a judicial body pass upon it, and when a law is once on the statute books no court would dare to declare it unlawful. The minister of justice stated clearly that this clause did not have reference to talking machines and was not to be construed as meaning gramophones, graphophones, phonographs, etc., but was especially intended to mean those mechanical piano-playing instruments where it was possible to interpret the exact intention of the composer; for example, the metrolistic addition to the pianola, etc. The result was that the Pianola Company, which had been fighting hard for a monopoly, and, as I have been informed, had already secured contracts from the leading composers, were able by means of this very innocent addition to the bill to get a monopoly in Germany, close contracts with the principal publishing houses, and make the manufacturers of other instruments pay tribute to them for the use of the rolls or prevent them getting such.

#### TROUBLE IN FRANCE.

This question came up later, in a very peculiar way, in France. A man named Vives, formerly in the talking-machine industry, undertook, on behalf of the Society of Editors and Composers, to bring suits in the name of certain composers against a manufacturer of talking-machine records and test the rights of the composer. He assumed all costs and was to receive a large percentage of all sums eventually collected from the various manufacturers. Pathé Frères were the defendants in this case. The case in the lower court went against Vives. In the higher court his contention was sustained, the decision of the court being along the following lines: That musical reproductions were free—absolutely free; but musical reproductions

involving the use of words were violations of the copyright laws. In other words, a musical reproduction was perfectly free to everybody; but to reproduce a song with the music was made impossible unless first by an arrangement with the composer or publisher.

The result was that Vives and his associates commenced a campaign against the talking-machine industry, which threw it into a panic. Under the laws a manufacturer could be fined and imprisoned for an offense of this kind. Several of the concerns shut their doors. The Gramophone and Typewriter Company's establishment in Paris was shut for several days. We never closed, but fought every point; but after much negotiation it became necessary for us to pay, as well as for the other companies to pay, thousands of francs for immunity. Of course the public eventually had to pay by reason of increased prices of the records. It was reported to me that Vives had secured more than a hundred thousand dollars from the various interests involved. He secured so much, in fact, that it was said he was losing his mind, and he used his money indulging in all sorts of extravagances, predicting what he was going to do to the industry throughout the world would keep them on the run for awhile, and to his suffering brothers across the seas who were not receiving royalties a message of hope was sent: "It'll be all right over there after awhile, when we have a chance to establish your rights."

I understand that this was the beginning of the movement in America, and that some persons are ambitious to duplicate in America what Vives and his associates have done in France.

#### TRIBUTE TO GRAFTERS.

At any rate we are paying to-day to Vives and associate men who never composed a piece, could not compose, and who have done nothing entitling them to it, a heavy tribute. This thing is likely to result in a national scandal, because one of the counsel in that case, now a member of the French cabinet, has secured a ministerial order to the effect that all talking-machine records of any kind that enter France are to be presumed violations of the copyright laws unless proved otherwise. In other words, records of pieces, whether they have any reference to French copyrights or not, which you attempt to pass across the border have first to go through those few ports of entry which are ports for the reception of copyright matter (three or four ports); second, the onus and burden is placed upon the manufacturer to prove what is on that record. If you want to escape this trouble (and it is an almost impossible task), you have to pay your little 5-cent tribute and stamp up your records in advance. The matter has been brought to the attention of the American State Department and to the attention of the consul-general, and the case is now before a final court of appeals, with the statement that there is not one chance in a thousand that we will be able to succeed, the theory being that the decision of the court below will be sustained.

#### THE ENGLISH SITUATION.

In England a case came up—a perforated-roll case—and the courts have held that the perforated roll in England is not a violation. That was before the passage of the O'Connor bill. The piano-playing roll has always been declared not a violation of the copyright in France. The only success they have had with the talking machine in those cases where the words are alone, or by reason of an executive order, the law has been extended so as practically to embrace everything.

The copyright matter has been before the House of Parliament in London in one shape or another for many years, and finally became a law during the last session of Parliament. The measure is known as the O'Connor bill and originally contained passages which would have been greatly to the detriment of mechanical players and talking machines. You are probably all familiar with the action that was taken. Through the efforts of talking-machine men a clause was added which made it perfectly plain that the law was not to be construed as covering perforated rolls, talking-machine records, etc.

#### THE BELGIAN CASE.

A case similar to the one of Vives and his associates against Pathé Frères was carried to final issue in Belgium, this being apparently a link in the international chain of actions which has now reached our country. The Belgian courts held that under the Berne convention, held years ago, the rights of composers and mechanical layers were clearly defined and that the composers had no rights.



## MONOPOLY IN ITALY.

In Italy a case reached final issue since the last session of the American Congress, and the rights of the composers were sustained to this extent: All musical compositions are divided into three classes; the first class representing pieces that have been composed in the last forty years and another embracing all compositions for the past fifty years. The result is that the largest music publishing house in Italy, Ricordi & Co., of Milan, who are the principal owners of the so-called Fonopio Company, manufacturers of records and disks, have obtained a monopoly. They have already granted to the Fonopio Company the exclusive right to manufacture disks, and that included all the modern compositions of Verdi, Leoncavallo, Mascagni, and other celebrities, and they are considering granting licenses upon pieces of the second class upon payment of certain fees, and also pieces of the third class. The Gramophone Company has been negotiating with them. We ourselves are very much interested. We have invested thousands of dollars in Italy and have been in negotiation with them for the protection of ourselves. Most of the companies quickly withdrew such records as were covered by the decision from their catalogues and warned their dealers against handling them, with a view of avoiding entanglements such as occurred in France.

## BEGINNING OF THE AMERICAN FIGHT.

You are all familiar with the American case, *White-Smith v. Apollo Co.*, and with the decision by the New York court of appeals that the perforated roll is not a violation of copyright.

These cases bring us up to the proposed American copyright legislation now pending before Congress. Toward the closing days of the last Congress an Associated Press dispatch was printed to the effect that there would be a meeting in Washington of a so-called copyright conference, to be held at the office of the Librarian of Congress, in Washington, D. C., on a certain day, and that those persons who were interested were invited to be present. The item stated that hearings would be had before the joint Committees on Patents of the House and Senate, and that thereafter the bill would be reported in both Houses. On the day that the report went out—and it is inferred that it was issued by the authority of the copyright office—the bill was actually introduced into both Houses of Congress. In other words, it was not introduced after the conference and hearings were to be held, but on that very day that the first news item concerning its introduction reached the public. I had heard from time to time of the copyright conferences, but never could get information in regard to them. I always had my own impressions as to what was going on, knowing the European situation, so I went to Washington.

There was a meeting at the office of the Librarian of Congress at 4 o'clock in the afternoon the day before the first meeting of the Congressional committee. The meeting was called together by the Librarian of Congress, and a temporary chairman and secretary elected. Motion was made that the Librarian of Congress be instructed to present the bill, as finally prepared, to the committee the next morning as representing the unanimous sentiment of those interested in copyright legislation. We had just then received copies of the bill for the first time. One of the trade papers, the *Musical Age*, I think, had secured an advance copy of the bill and published some of the paragraphs in it, which were revolutionary in character; things which had not been attempted in any other country and which would jeopardize our own interests and those of you who make mechanical instruments of any kind whatsoever. When the motion was put, some man got up (we were all strangers) and suggested that it seemed hardly the appropriate thing to do. The account of this meeting does not appear in the records of the copyright conferences as compiled by the Congressional committee.

## THE "MUZZLING" PROCESS.

This man had hardly gotten on his feet when someone else jumped up and asked: "Who is the gentleman speaking? Is he a member of the conference? If not, he is out of order and he has no place here." That caused something of a sensation. I think it was Mr. Walker, a well-known authority on patents, who arose and stated that he was not a member of the conference; had not been informed as to what had been done, but he had received an invitation to come down. If the last speaker's remarks meant that he had no right to speak, he wanted to know it.

I stated that I had come from New York on an Associated Press dispatch; that I had an interest there; that I wanted to be heard on the subject, and would like to

know whether or not I had a right to speak. Then a man from Chicago arose and stated that he had just gotten in at 2 o'clock and rushed up to the meeting, and he felt sure that if all the manufacturers of the country interested knew what was in that bill the Library would not hold all who would have attended.

At this point a member of the International Typographical Union arose, a Mr. O'Sullivan, I believe, and stated that he was quite sure that there would be people who would butt in at the last moment, and who would not approve of all the sections of the bill, but that the chairman would bear him out that they had spent a whole year and a great deal of money in working up this bill, and this was the bill, without one comma changed, that was going to be presented the next morning to the members of the committee as representing the unanimous sentiment of the conference. "Of course," said he, "we do not expect to please everybody, but they are all out of order, and the Chair should rule them out of order."

The Librarian then was beginning to get a little agitated, and someone suggested that the resolution should be altered so as to read as follows:

"*Resolved*, That the copyright bill as prepared represents the unanimous sentiment of the associations which were represented at the copyright conference."

A vote was then attempted. We would not recognize their right to shut us up. Someone, representing, I think, the Kimball Company, put the final knife into the resolution by stating in a very mild and gentle way how highly inappropriate it would be for an officer of the National Government, the Librarian of Congress, to appear before the joint committee to-morrow morning and present this resolution, thereby giving to it the weight of his official position. That it was very evident that several gentlemen present, coming from various parts of the country, were opposed to the measure. In the meanwhile, in order to have this resolution put through, and on the theory that it was all going to be nicely done, Mr. Putnam, the Librarian, who had been acting as chairman, had left the chair so that somebody else could put the motion. Then Mr. Putnam himself spoke, and stated that enough had been said to convince him that it would not be right to pass such a resolution, and he hoped that the gentleman would withdraw the motion, and that it would be his duty the next morning to present the bill to the committee, and that he could do nothing further than to recommend it to their favorable consideration.

We succeeded in defeating the resolution, and the meeting ended in confusion.

#### FIRST MEETING OF MANUFACTURING INTERESTS.

We quickly corralled those persons who seemed to be our friends (Sousa and Herbert, by the way, were the only composers present), and there were also representatives of various interests—music publishers, typographical union, artists, librarians, sculptors, etc. The interests were greatly diversified. It was proposed that those opposed to the bill, in so far as related to mechanical reproductions of music, go into conference at the Hotel Raleigh. I think there were about eight of us. We conferred that night until midnight and agreed on a general plan of action as to who should represent the different interests. The joint committee assembled next morning and the hearings occupied several days. Much time was occupied on matters of little interest to us. Finally the sections of the bill relating to musical copyright were reached and the fight was on. Without going into details, as the printed report of the hearings can be had, I will say that in the limited time at our disposal we could hardly do more than to state briefly our reasons for objecting to the bill as it now reads. We are able, however, to get a pledge from both Chairman Currier and Senator Kittredge, the chairmen of the two committees, that the bill would not be considered during that session of Congress, and were assured by them that everybody would have a chance to be heard.

#### THE ÆOLIAN CONTRACTS.

During the presentation of the matter Mr. O'Connell, a lawyer for one of the piano-playing concerns, made a very able presentation of the case from his view point and received the closest attention of the committee, and was able to present copies of the Æolian contracts with various publishers which you, gentlemen, know are in existence. The committee adjourned with the understanding that they would convene again in December and all interests would have an opportunity to be heard.

Since that time the only thing of importance that has transpired was the article in Appleton's Magazine by John Philip Sousa, which is a part of a campaign on the part of those interested in passing the measure to create public sentiment in favor of the bill.

I do not think I could have been any briefer and tell the whole story, gentlemen. I have not the slightest doubt that this movement, which started abroad and which has now reached America, is a part of a movement to monopolize the mechanical playing instruments themselves, and the output of music rolls and records.

Those controlling a monopoly of new music as issued would practically control the mechanical instrument industry; and the machines which are covered by patent protection during a limited number of years will be in the hands of schemers who will be able to extend that patent protection for all practicable purposes up to, say, one hundred years if this bill becomes a law and their plans are not checked.

(The following articles were submitted by Mr. Cromelin, and, by direction of the committee, are printed as part of the record:)

*An article on the copyright bill in the Musical Age.*

To Alfred B. Kittredge, of South Dakota, chairman; Moses B. Clapp, Minnesota; Reed Smoot, Utah; Philander C. Knox, Pennsylvania; Stephen R. Mallory, Florida; Murphy J. Foster, Louisiana; Asbury C. Latimer, South Carolina, Committee on Patents of the Senate. Frank D. Currier, New Hampshire, chairman; Solomon Dresser, Pennsylvania; Joseph M. Dixon, Montana; Edward H. Hinshaw, Nebraska; Robert W. Bonyne, Colorado; William W. Campbell, Ohio; Andrew J. Barchfeld, Pennsylvania; John C. Chaney, Indiana; Charles McGavin, Illinois; William Sulzer, New York; George S. Legare, South Carolina; Edwin Y. Webb, North Carolina; Robert G. Southall, Virginia; John Gill, jr., Maryland, Committee on Patents of the House of Representatives.

GENTLEMEN: On December 7 you are to again take up the consideration of new copyright legislation. The measure which you are to discuss entirely sweeps away the old law and replaces it with new provisions throughout, embodying a radical change in policy. Unquestionably the time has arrived for a revision of the existing copyright laws. Many provisions in the new bill are wise in character and intelligently meet the necessities which a modern age demands. Without entering into a discussion of the bill as a whole, and confining this communication to the issues in which the musical age is directly concerned, we would like to place before your committees in as true a light as possible the position of the Musical Age at the present time.

1. We are unequivocally in favor of the part of the bill which follows the recent English legislation, having for its object the suppression of piracy of printed or sheet music, with the attendant clause which makes it a criminal offense to reprint or sell copyrighted music in sheet form.

2. We are wholly and unalterably opposed to the clause known as paragraph g, which restricts the use of musical compositions upon mechanical playing devices of any description whatsoever.

In explanation of this position which we are bringing so prominently to your notice, we would respectfully submit that in our attitude upon the first question we are swayed by the knowledge gained in the publication of a musical paper, which for twenty-three years has been second to none in fighting for the real business interests of the entire musical industry. We know that the actual financial welfare of the composers of music and the publishers of musical compositions has suffered through the insufficiency of the present copyright laws by which the legitimate publishers have been placed absolutely at the mercy of irresponsible parties, who have stolen the property of the publishers and reprinted their productions at a low price, thus seriously affecting the earnings of the publishers gained through their enterprise, their investments, and their labors. We firmly believe that the only way to suppress this drain upon a great business is to incorporate in the new laws a criminal clause covering offenses of this character.

In our opposition to the mechanical reproduction clause, paragraph (g), of section 1, we wish to bring to your attention these facts:

Neither the publishers of music, the composers, the public, nor a majority of the manufacturers will be benefited one whit by its passage.

Only the Æolian Company, in itself a nucleus for a trust, and a few of its hirelings in the ranks of the publishers and composers will derive benefit from the proposed law.

In substantiation of these statements we would call your attention to the United States Census Bureau report just out, from which it will be seen that the value of the sheet music product increased from \$2,272,385 in 1900 to \$4,147,783 in 1904, which, based upon calculations made by The Musical Age, would be an increase of 163 per cent in the period between 1900 and 1906. This increase of 163 per cent in six years has meant a period of unexampled prosperity in the music publishing industry.

The income of the composer is based absolutely upon the income of the publisher. The prosperity of the publishers has been made possible through the popularization of their products by means of the automatic musical instruments. In so far as the public is concerned, the passage of this paragraph would mean the elimination of competition in the production of roll music. It has been and will be shown to you that the Æolian Company has in its possession contracts with practically every publisher of prominence in the United States, covering a term of thirty-five years, by which this company obtains full and absolute use of all musical compositions as soon as litigation or legislation secures to it the absolute control of the copyright. The possession of these contracts will enable the Æolian Company to stifle all competition. Eliminate competition in this field and immediately there enters that condition in industrial life which has militated so much against the prosperity, the progress, and the pleasures of the people during recent years.

That the manufacturers of the country are against this measure will be indicated to you clearly and forcefully during the coming week. Two strong organizations, comprising eighth-tenths of the invested capital in the industry, will appear before you protesting against this provision of the new law. But, above all financial and material arguments which you will be compelled to listen to, we wish to bring home to you the fact that the passage of paragraph (g) would mean taxation to the owner of every piano, phonograph, and music box in this country. The tendency in the industry at present is to decrease the cost of the appliances by which the use of these instruments is made possible—the music rolls, the talking machine records, and the music-box disks and cylinders. By making possible the establishment of a monopoly in this field, you tamper with one of the greatest enjoyments of the American people—the enjoyment of music. No provision of public policy, no subtle arguments based upon industrial development, no clamor for the protection of the rights of any particular class of men, can appeal so strongly as the incontrovertible fact that your committees are asked to recommend the passage of a measure which enables another monopoly to reach out its greedy hands to grasp the dollars of the 82,000,000 of American people.

We ask you to kill paragraph (g).

THE MUSICAL AGE.

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*Editorial in The Musical Age.*

NEW YORK, June 30, 1906.

KILL PARAGRAPH (G.)

Washington dispatches contain the information that the only serious protests entered so far against the provisions of the new copyright bill come from the makers of mechanical musical instruments. The printed report of the arguments before the joint committee on patents, which has just reached our desk, contains 206 closely printed pages, 90 per cent of which consists of arguments of those opposed to paragraph g of the bill, which forbids the use of copyrighted music, as follows:

"To make, sell, distribute, or let for hire any device, contrivance, or appliance especially adapted in any manner whatsoever to reproduce to the ear the whole or any material part of any work published and copyrighted after this act shall have gone into effect, or by means of any such device or appliance publicly to reproduce to the ear the whole or any material part of such work."

The relationship existing between the Publishers' Association and the makers of mechanical instruments has been somewhat misunderstood. The publishers in their fight for copyright protection are chiefly interested in making the pirating of music a penal offense punishable under the laws of the Federal Government. This particular portion of the fight The Musical Age indorses, but after careful consideration of the mechanical instrument clause quoted above, together with its bearing upon the future of the music trades, and upon the almost predominant feature for which The Musical Age has been fighting for many years—the true democracy of music—we take the stand that the clause in question should be omitted in its entirety from the bill.

This proposed provision of the new bill affects directly the interests of the 80,000,000 of people in this country. It proposes to restrain and to place a tax upon the pleasures of the people. The refining and educational features of music are beyond question.

Photography, a modern process, coupled with the cheap engraving processes of late years and the abundance of popular illustrated papers, magazines, and books, has made art, in its broadest sense, familiar to every man, woman, and child in the

country, and the choicest productions of the masters are familiar in every village and hamlet in the United States.

Art has been popularized. The same conditions exist in literature. No manufacturing city is so busy, no farming community so small that it does not contain its library. A list of the Carnegie benefactions alone resembles a half dozen pages of an atlas. The most expensive productions of the publishers of the world, the results of centuries of thought and investigation, are free to all who care to avail themselves of the opportunity to study and to learn.

In music the conditions are different. To hear good music is expensive. Before the invention of the mechanically played piano it was necessary for the student to undergo long years of patient study and hard work and to spend hundreds of dollars in education. Before the invention of the phonograph nine-tenths of the people had never heard the productions of the famous bands and musical organizations of the world.

These two separate and distinct classes of inventions have done a great deal toward making music popular and democratic; but in spite of the prosperous condition of the country, in spite of the cheapening influence of these modern mechanical wonders, there are still thousands of homes and hundreds of communities which have not felt the result of this cheapening in production. And the inventive geniuses are still at work. Our news pages last week chronicled the formal introduction into New York of the Cahill teleharmonium, through the agency of which it is expected that music of the highest class will be distributed from a common center to 10,000 subscribers. This week we give space to a new and wonderful invention called the telegraphophone, destined before many months to make its influence felt in the music world. This instrument is a combination of the telephone and the phonograph, using a continuous strand of wire instead of wax cylinders or disks for recording purposes. And the end is not yet in sight.

If it is now possible to transmit music through the agency of wires over long distances, necessarily it will be but a short time before the mysterious influences which have made wireless telegraphy possible will be utilized in the dissemination of music. We look for no Utopia in this direction, but the progress of science is intensified through succeeding years.

The wonder of to-day becomes the household necessity of to-morrow.

No living man can predict to-day the conditions that will exist five years hence.

In spite of the sensational output of the cheap magazines, in spite of the work of the wielders of the muck rake, the world is growing better every day. Step by step civilization is advancing, and the wastes of this small globe of ours are gradually being turned to garden spots. Centuries of darkness and ignorance are being overthrown in a week. To restrict the production of cheap music would retard the work; it would be a step backward.

The copyright section in question says that no one shall reproduce by any appliance or in any manner whatsoever to the ear any material part of a copyrighted production. This means that the proprietors of these new and wonderful inventions, and of the inventions to come, could not use any copyrighted music without paying heavy royalty.

This royalty will come from the people and will go into the hands of the few.

The Musical Age does not occupy the position of desiring to see the laborer robbed of his hire. The composers of music in this country have been working for years under the provisions of a copyright law that gave them little protection. The law should be amended so that they get the protection which is their due. The clause making the pirating of music a penal offense should go through, but this should apply only to sheet music. It will not be a modern step to place a tax upon the pleasures of the people. Practically every municipality in the country provides free music to its people. Music everywhere should be as free as the songs of the birds and the whispering of the breezes in the trees.

Paragraph g should be withdrawn.

The CHAIRMAN. Mr. O'Connell, you may have until half past 10.  
Mr. O'CONNELL. Yes, sir.

#### STATEMENT OF JOHN J. O'CONNELL, ESQ.

Mr. O'CONNELL. Mr. Chairman, this is the end of a very long and trying session. We have been here now since 11 o'clock this morning, and I suppose that all you gentlemen are as tired of hearing the arguments of the various parties here as we are of waiting to be heard.

I represent at this hearing 19 houses, 18 of which are manufacturers of piano players and player pianos in the city of New York, and one is one of the largest dealers in musical instruments of all kinds in the country. As was stated to you when I was here in June, when we came without any preparation to speak of, our position as manufacturers of piano players was that we were here simply to protect the capital that we had invested in a large business. Then I represented 10 houses. A couple of those have dropped out—one because it is no longer interested in the business. Since then others have come in—19 of them—and I want to say to you that a number of other houses in New York who manufacture players also wanted to come in and wanted to divide the expenses, but they refused to permit their names to be used. Therefore we refused their aid or cooperation.

The houses that I do represent are: Boardman & Gray, Albany, N. Y.; Rudolph Wurlitzer Company, Cincinnati, Ohio; Lester Piano Company, Philadelphia, Pa.; E. Gabler & Bro., New York; Estey Piano Company, New York; Pease Piano Company, New York; Strich & Zeideler, New York; Kroeger Piano Company, New York; Jacob Doll & Sons, New York; Pianova Company, New York; Ludwig & Co., New York; The Laffargue Company, New York; Regal Piano and Player Company, New York; Ricca & Son, New York; Rudolf Piano Company, New York; Winter & Co., New York; Davenport & Tracy, New York; Stultz & Bauer, New York; Paul G. Mehlin & Sons, New York.

I am also requested to say to you by Mr. E. S. Conway, of the W. W. Kimball Company, of Chicago, that both he and his company are unalterably opposed to paragraph g of the proposed bill, and that they are unwilling to accept the bill with a royalty provision added.

As I stated then, those houses have no particular quarrel with Mr. Herbert or Mr. Sousa. I also stated then that it was very extraordinary that the house which was seeking to gain a monopoly of this business was not nominally represented in any way at these hearings. I say it is more extraordinary still at the present time. They have had a great deal of time to consider this. They know the charges made against them. If anybody's ears would tingle, theirs ought to. But ostensibly no representative is here.

True, we have had a number of altruists here, who, interested nominally, apparently, only in authors and publishers of books, have gone out of their way whenever the question of paragraph g or Mr. Stewart's addition to paragraph f came up, and took up everybody's time to convince you that they, the altruists, insisted that, while they were not interested in a business way or monetarily in the musical industries, the bill should go through as a whole. It reminds us very much, gentlemen, of the saying attributed to Benjamin Franklin about "Hanging together or hanging separately."

A number of questions have been raised here and some of them have been discussed very fully. Mr. Walker went very thoroughly into the question of the constitutionality or the unconstitutionality of this bill. I do not presume to know as much about constitutional law as Mr. Walker does, nor as the very learned and able counsel for the music publishers, Mr. Burkan. But I do say to you, sirs, that the question of the constitutionality of this bill is one merged in the greatest doubt. The language of the Constitution is plain; the decisions of

the courts are plain. You only have the power to pass bills giving authors the exclusive right to their writings and inventors the exclusive right to their discoveries. A writing has a clear designation and a definitive meaning. You only have the right to prevent copying of writings. The question was asked this afternoon whether raised figures for the blind are an infringement of a copyright. Mr. Dyer, I think, answered "Yes." I did not hear, because he spoke very low. And while it is true that the blind can not see those raised figures, I do not know that there is anything that prevents a man with a pair of good eyes from seeing them and reading them. They convey a distinct impression to a man with a pair of good eyes, and are, therefore, readable.

I will pass that question, and I will come to the question of the invasion of the field of patents by this proposed act, paragraph g. And while on that, it is well to consider the very beautiful and technical exposition that Mr. Steuart gave you when speaking in behalf of this bill the other day. He did not call the attention of any member of the committees, neither has the attention of any member of the committees been called at any time, so far as I have been able to ascertain, to the original communication sent to the Librarian of Congress by the Commissioner of Patents on the 21st of June, 1905. I do not know whether you gentlemen, or any of you, are familiar with it. It was in answer to the original invitation. I will not read it at length, because my time is too limited. But I call your respectful attention to it, and I want you all to consider that after that communication (which does not appear to have been acknowledged), at no time afterwards did the Commissioner of Patents take part in any of the conferences. He gives what is to my mind a very clear exposition of the distinctions between the law of trade-marks, copyrights, and patents, and the powers of Congress to pass bills as to any of those three, and also as to what ought to be properly included under any of those heads. My reading of this document (of which I have a copy made in the Patent Office) shows clearly that the use of a mechanical device of any kind for the reproduction of sounds, or legislation which seeks to prevent the use of a mechanical device for the production of any sounds, does not come within the purview of the copyright law. If you are uncertain on the subject, I have no doubt that Mr. Allen, the Commissioner of Patents, would be very willing to appear before you and give you the benefit of his advice and long experience.

Mr. CURRIER. Do you wish to put that in the record?

Mr. O'CONNELL. Yes, sir; it is in the record somewhere; the original letter ought to be in the files somewhere.

A GENTLEMEN. Put it in again.

Mr. CHANEY. I think we had that letter before we started in on these joint hearings.

Mr. BONYNGE. I do not know whether it is published in the record or not.

Mr. CHANEY. It is in the record.

Mr. O'CONNELL. It is not in the record of the arguments at all.

Mr. BONYNGE. Well, then, let us put it in.

(The letter referred to is printed at the end of Mr. O'Connell's statement.)

Mr. O'CONNELL. It ought to be in the files somewhere, Mr. Bonynge. The substitute which Mr. Steuart proposed in the way of taking out

paragraph (g) is really just about as bad as paragraph (g). It is not so raw; the language is not so palpably an infringement of the patent field; it is sugar-coated; but, gentlemen, the pill is just as bitter, even though it is sugar-coated. There is nothing which is covered in paragraph (g) that is not covered and more than covered in the substitute as proposed by Mr. Steuart.

I might say at the outset that Mr. Steuart is a gentleman who stands very high in patent law—extremely high. But he has been a patent practitioner for a great many years. His thoughts are in the line of patents. The patent law is a fetich to him—something to be canonized. If you give him the idea as to what ought to be included, and tell him that you want that covered by the law, then I doubt not that he is as splendid a man as you could find to put that into execution; but as to deciding what is or what is not proper to include in a copyright act, what things to protect and what things not to protect, I take it, gentlemen, that the field of legislation is a little bit broader than the field of patent law, or the patent solicitor, or the patent attorney, with all his technicalities.

Now we come to the second question. Let us assume for the moment that the committee decides that it has the power to pass a bill such as is proposed here. Then we say to you that you ought not to exercise that power, and for a great many reasons. The first reason you have probably had almost ad nauseam, this monopoly of the *Æolian* Company. These contracts have been up and down the table here before you, and practically every speaker has discussed them. We have had two sets of them, the contracts with the music publishing houses and the contracts now with the manufacturers. There is a question raised in the minds of a number of members of this committee as to whether the force of those contracts was not conditioned upon the White-Smith suit, and whether they would last so as to cover a situation where a new copyright law was passed.

Now, gentlemen, let us look at this as thinking men—men who know something, who have the ordinary faculties. Certainly you do not require legal proofs in a meeting of this committee. You are not bound down or tied down by the hard rules of legal procedure—nothing of the kind. That is not your province. What was the object of those contracts which were put in evidence last June—the contracts with the Music Publishers' Association? They did not give us those contracts. We ferreted them out and found them almost by accident. They were not publishing them.

Now, what was the object? The object of those contracts was to get a monopoly of the music-cutting business. That was their object. Is it reasonable to suppose that the leopard has changed his spots? Is it reasonable to suppose that they have given up that object?

If we assume that those contracts fell on the failure of the White-Smith suit—let us assume that, which I do not concede, sirs—is it reasonable to assume that they stop there? Is it not more reasonable to assume that they still have their hankering after the monopoly, and that they have it clinched in some way? Is not that common sense? Have we not got almost direct proof of it in the contracts which were submitted, in the contracts which they want the manufacturers to sign, and which Mr. Pound offered in evidence here? And I have another one myself which was submitted to one of my clients, who also did not sign.



Those contracts provide specifically for the passage of legislation which shall give them the exclusive right in music rolls and such mechanical devices.

The CHAIRMAN. When was that contract presented to your client?

Mr. O'CONNELL. I have no record of that here, and I am not going to state anything that I am not sure of; but this contract was handed to me in the city of New York on Monday afternoon last. That is the first I saw of it.

Mr. CHANEY. Is that contract like unto that which was presented a little while ago?

Mr. O'CONNELL. The same form of contract that was presented by Mr. Pound; but I want to call attention to some features that Mr. Pound has not called attention to.

In the first place, there is no specific period of duration in that contract. It is clearly a sop to the manufacturer—nothing else—to induce him to come in. And who is to be skinned, if I might use that expression? The poor, unfortunate public.

Now, look at this: The contract provides, in the first place, that the dealer—that is, the man who sells the roll to the consumer and the owner of a piano player—can only sell it at the catalogue or list price. If he sells for less than the catalogue or list price, never again can he get any rolls from the Æolian Company.

Now, look at the discounts they take off: Fifty per cent off the catalogue first. That is the first discount to the manufacturer or his dealer. After that comes 60 per cent of what is left. Then, if he purchases 25,000 rolls in a year, he gets 10 per cent additional off. If he purchases 50,000 a year he gets 15 per cent off. If he purchases 75,000 a year, he gets 20 per cent off, and if he purchases 100,000 rolls a year, he gets 25 per cent off in addition.

Now, see how it works out. Let us assume that there is a music roll which has the catalogue price of \$5—simply take that as a round figure, so that we can easily get at the result. That is the catalogue price. That is the price a consumer must pay. Fifty per cent off that leaves it at two dollars and a half; 60 per cent off that takes another dollar and a half off, leaving it at \$1, and the 25 per cent additional rebate taken off leaves that at 75 cents. Now, do you see the sop to the manufacturer and the dealer? They say, "Now, we give you a roll for 75 cents that you must sell to the public for \$5. See the tremendous profit you get? Now, it is to your interest to come in under that and take it and keep it." That is the way they think of the rights of the public, Mr. Chairman.

I do not need to go into the subject that as a matter of fact the composers had nothing to do with the framing of this bill. I think that is amply proven before you.

Mr. WEBB. Mr. O'Connell, just a moment. Have you any information as to how many of the members of this Music Publisher's Association have signed this contract with the Æolian Company?

Mr. O'CONNELL. This present contract, sir, that was offered in evidence here is not a contract with the Music Publishers' Association at all.

Mr. WEBB. No; I do not mean that contract, but the contract we have had here before.

Mr. O'CONNELL. No, sir; except as I have heard it stated here; and in the nature of the thing it is hardly susceptible of proof by us.

How can we prove it? We can not do it. They are not telling those things. We found this by accident. I think it has been said here to-day that 52 of them have signed. I think somebody asked Mr. Bowers if 75 had not signed. Mr. Bowers said it was not as much as that. Somebody asked him again if a great many of those contracts had not been witnessed by him, if he had not gone out and gotten them, and he said he had not gone out and gotten them all, but he had gotten quite a bunch of them, which is probably true.

Mr. WALKER. At one time, day before yesterday, Mr. Bowers said the number was about 80, here in this room.

Mr. WEBB. I did not know about that; but there are only 50 members of this association, or 52, are there not, Judge?

Mr. WALKER. I think the members are much more numerous than those on that list.

Mr. CHANEY. But that list was given to us as the whole number.

Mr. WALKER. Yes. Well, Mr. Bowers said there were about 80 contracts. He said that here two or three days ago.

Senator SMOOT. There must have been some without the association, then.

Mr. WALKER. Yes; some must have been outside of the association.

Mr. O'CONNELL. Now, Mr. Chairman, I have stated here a couple of times that the only composers who have been present here, who were represented in any way, were Mr. Sousa and Mr. Herbert. I understand that Mr. De Koven was represented by some counsel here yesterday. Now, I am sorry that Mr. De Koven or his counsel is not here to-night, because I shall break in here on a subject which will probably interest you very much, and will show you that the composers, notwithstanding all they may say, are not the angels that they would make themselves out to be.

In other words, how are we to be protected—the cutters of music, the manufacturers of players, pianos—in regard to a piece of music which, we will say, was originally composed somewhere in Europe seventy years ago, and then again, a few years ago, was “originally composed” in America and copyrighted? [Laughter.] Where is our protection going to come in? Is that in the public domain or not? Perhaps after a long fight we will be able to beat them on a question of that kind. But there is no provision of the law which revokes their copyright in case it is not shown that they are original.

I have here before me a piece of music which I got from Schirmer's house, to which our friend Mr. Tindale belongs—a very old piece. It was copyrighted by Schirmer in 1884. I discovered on looking it over that really all that was copyrighted by Schirmer was the translation of the words. Now, I find a note in here to the effect that that piece was composed by a man of the name of Gastalden, away back some thirty years previous, and the name of the piece then is “Musica Proibita”—“Forbidden Music.”

I have another piece here, copyrighted some years afterwards by this same house of Schirmer, and it appears here copyrighted under the title of “O Promise Me.” [Laughter.] “O Promise Me” and “Musica Proibita” of fifty years previous are one and the same piece of music. The theme is the same, but dropped one tone. There is more in “Musica Proibita” than there is in “O Promise Me,” but there is nothing in “O Promise Me” that is not in “Musica Proibita.”

Mr. TINDALE. May I ask the gentleman one question, with the chairman's consent?

Mr. O'CONNELL. I do not mind your taking up a little of my time.

Mr. TINDALE. I would like to ask you why people buy 10,000 copies of "O Promise Me" and they buy scarcely a dozen copies of "Musica Proibita," if they are one and the same piece?

Mr. O'CONNELL. Because "O Promise Me" is well advertised.

Mr. TINDALE. No, sir; we never have advertised it except to put it in our catalogue.

Mr. O'CONNELL. The graphophone, the gramophone, and the musical-instrument people have been advertising it for you for a good many years. [Great laughter.]

Now, another question: Whence comes this demand for turning mechanical devices into the copyright field? Have the composers demanded it? I have not seen any demand anywhere from them. Mr. Sousa has been here, and he has been a host in himself. Why, gentlemen, if this bill goes through in any form, the music publishers and the Æolian Company can not possibly do enough for John Philip Sousa, with his magnificent personality, his suave manners, his keenness of intellect, with his ability as a cross-examiner of the various speakers who have spoken on our side, and with his never failing to get in, "Did you pay for it?" [Great laughter and applause.]

Mr. Sousa, did the publisher of the Washington Post March pay you anything, ever, after he paid you the first \$25.

Mr. SOUSA. Thirty-five, sir.

Mr. O'CONNELL. Thirty-five, was it? You were \$10 ahead, then. [Laughter.]

Mr. SOUSA. I should like to say, Mr. O'Connell, that these two compositions are not the same.

Mr. O'CONNELL. Take the theme and the very first bars.

Mr. SOUSA. I have only met Mr. De Koven once in my life. The first measure of this "O Promise Me" and "Prohibited Music" begin just the same, but the harmonic structure after that is different. As a composer myself, and I hope an honest one, I would not charge Mr. De Koven with plagiarism in this thing.

Mr. O'CONNELL. The difference is in the harmonics. Is the theme the same?

Mr. SOUSA. The first measure is identical.

Mr. O'CONNELL. Is the theme the same?

Mr. SOUSA. No, sir; I could prove this if I had a chance. If you could put two pianos here, and a singer for each one, and have them sing them, I will assure the gentlemen here that you will find discords in the two things. That is, one will be different from the other—for instance, I would like to explain that if you will allow me just one minute.

Mr. O'CONNELL. How about my time, Mr. Chairman?

The CHAIRMAN. That will be all right.

Mr. SOUSA. Just a second.

Mr. O'CONNELL. It will not be taken out of my time?

Mr. SOUSA. Just a second. I wish I had a fiddle here, or a piano. I can not sing, or I would do that; but you would not understand it if I did, because I have a horrible voice.

The introduction, first of all, is entirely different—not at all alike. The first measure is the same, exactly. In the second measure the

first note is wrong. The third and fourth beats of the second measure are entirely different. The next measure is entirely different again. The chord forming the first end of the first strain is entirely different in the two compositions. One is the dominant chord and the other is the tonic. I would never say that one of those compositions was the same as the other.

Mr. LEGARE. There is a good deal in one that is in the other, though. [Laughter.]

Mr. SOUSA. Well, I would not say—that is a very bold statement, and I do not think it would be sustained by any musician in the world—that these two compositions are alike. I would not like to do it; not on my oath.

Mr. WEBB. Is there a striking similarity between them?

Mr. SOUSA. They are both ballads. I have never seen the “Musica Proibita” until to-day. “Oh, Promise Me,” I know very well. But I would never say that Mr. De Koven took one composition from the other.

Mr. O’CONNELL. I offer both of them in evidence, and it is likely that there are many gentlemen on the committee with a musical education, as far as piano playing is concerned, so that you may try them both out.

The CHAIRMAN. You do not ask that they go into the record, I assume. [Laughter.]

Mr. O’CONNELL. Well, you can not put them in the record, but I offer them in evidence.

(At this point Mr. Paul H. Cromelin sang for the committee the first measure of each piece of music referred to by Mr. O’Connell.)

Mr. CROMELIN. Now, what is the difference? [Great laughter.]

Mr. SOUSA. Mr. Chairman, I can prove to you that these are different if you will allow me to do it in my way. Will the stenographer take down the syllables?

Mr. O’CONNELL. I am afraid that the committee and the stenographer will not understand your highly technical description as easily as they did Mr. Cromelin’s practical illustration.

Mr. CROMELIN. Have I sung them correctly, Mr. Sousa?

Mr. SOUSA. The first measure is identical. I told you the first measure was, but I tell you one departs from the other there. I would never say that one was the other. I can prove it, Mr. Chairman, if you will give me four minutes.

(At this point an informal discussion ensued among a number of gentlemen, during which it was stated that the similarity between the two pieces had been talked about for some time.)

The CHAIRMAN. You may proceed, Mr. O’Connell.

Mr. O’CONNELL. Now, I want to show also, Mr. Chairman, that, as a matter of fact, if this bill is passed in its present shape, it will not be to the benefit of the American composer, but to the benefit of the foreign composer.

In the first place, quite a percentage of the publications used in piano-playing machines, particularly, comes from the pens of foreign composers. This is not true to so great an extent in the talking-machine records, where, as I understand, a large number of pieces which come under the classical name of “ragtime” are put out day after day and week after week. We do not play very much ragtime in these automatic players.

The rule laid down as to foreign composers is this: That they shall have the same rights as American composers. That is absolute. Of course, there is an alternative provision there, which amounts to nothing, but it is laid down that they shall have the same rights in this bill as American composers have in this country. Now, you take England—

Mr. CURRIER. What section is that? I would like to turn to that. I had it a moment ago.

Mr. CROMELIN. Section 8 b.

Mr. O'CONNELL. Yes; here it is:

When the foreign state or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens—

And there is an alternative—

or copyright protection substantially equal to the protection secured to such foreign author under this act.

Mr. CURRIER. Just a moment, Mr. O'Connell. Suppose you should strike out the word "on" before "substantially" in the first line.

Senator SMOOT. Page 6?

Mr. CURRIER. Page 6; then strike out the whole of the second line; strike out the words "the same basis" in the first line and all of the second line, so that it would read, "the benefit of copyright substantially equal to the protection secured to such foreign author under this act."

Mr. O'CONNELL. No; the other provision is what ought to go in, sir, to give the foreign composer the same benefits here that his country gives our composers.

Mr. CURRIER. Yes; exactly.

Mr. O'CONNELL. That is what we want.

Mr. CURRIER. I do not see any objection to that.

Mr. O'CONNELL. Well, now, you are giving him the same rights—

Mr. CURRIER. You are giving him double rights.

Mr. O'CONNELL. Exactly; you are giving him the same rights as your composer has here, whereas his country does not give our composers such rights as we give the foreign composers.

Mr. LEGARE. You want reciprocal rights?

Mr. BONYNGE. We want to give him the same rights as his country gives us.

Mr. O'CONNELL. As his country gives us; yes.

You have had it proved to you by Mr. Cromelin, I think, beyond any question of a doubt, that the use of these reproductive devices did not injure the sale of sheet music at all, but, on the contrary, helped it; so I shall not touch on that question. Neither shall I go into the question of statistics, which he covered very fully. But there is a very important point for you to consider and that is this, What will be the result on inventive genius as applied to perfecting those reproducing machines, or perfecting automatic piano-playing machines or the rolls used in them? Will it not put a great damper on genius in so far as it is directed toward such inventions? What is there in it for them? If, as a matter of fact, their use of those reproductive mechanisms is absolutely restricted and controlled by somebody else, what is going to happen? Is a man going to spend his time and his brains and his labor and his money in trying to perfect those machines,

which are really still in their infancy, when he finds, as a matter of fact, that after he has invented the device he will have to go with his hat in his hand to some monopoly to get leave to use the current compositions.

In that way, sir, as I submit to you, it will mean a great damper on inventive genius.

Another point which has been taken up by both Mr. Pound and Mr. Walker is this: Take the manufacturers that I represent; they have proceeded in accordance with law. They have been perfecting, for many years, piano-playing devices. They have been going ahead and spending a great deal of money in establishing factories, getting tools, machinery and everything else, and getting proper business system established. What is going to happen? They have been going ahead, not taking anything that they did not believe themselves entitled to. What is the result? If this bill is passed, the result will be that all that is lost, or practically lost.

Now, getting down to a still broader question—it is this:

This country is conceded everywhere on the globe to have made greater strides in invention than all the other countries taken together. This country is the home of mechanical devices for reproducing sounds. It is the home of the graphophone, of the gramophone, and the home of the piano-playing machine. Why, therefore, should we take the lead in restricting the use of those devices when the other countries, England, France, Germany, Switzerland, and Belgium, have specifically refused to take the lead in that direction, but each one of them has come out flat-footed and said: "We will not attack these lines of business; they are employing labor; they are supporting thousands upon thousands." Why should we do it?

Now take England—

Mr. BONYNGE. Is there any country that copyrights these things now?

Mr. O'CONNELL. The only one that I have been able to find is the decision on a phonographic or graphophone record in Italy. That was a suit—

Mr. CROMELIN. It is on appeal now.

Mr. O'CONNELL. It is on appeal, so it is not a final decision. That suit was brought by the biggest musical publishing house on earth—the Ricardis, of Milan. They wanted to clinch their monopoly on the music-publishing business, and they owned the rights of publishing practically all of the European classics. As Mr. Cromelin has told you, Mr. Ricardi has been in this country very recently, and he has told him that just as soon as they get this act passed they will put the screws to all of us, and I have not the slightest doubt but what they would if you ever passed that act, which I hope you do not.

Now, see what England has done—and by the way, that subject is very interesting. This bill, entitled "The Sixth of Edward the Seventh, chapter 36," "An act to amend the law relating to musical copyrights," became a law the 4th of August, 1906. The gentleman who introduced that bill in the House of Commons, and who was mainly instrumental in forcing it through to passage, was Mr. T. P. O'Connor, a very famous countryman of mine. He came to this country a couple of months ago. All the newspapers in New York printed column after column of the wonderful things that he had done for the composers and the music publishers. The music publishers and the composers,

they say, some of them (I did not notice Mr. Sousa's name amongst them) went out of their way to throw bouquets at him, to use a common expression. He was wine'd and dined; a great banquet was given him by the Music Publishers' Association, at which one of the shining lights was our friend, Mr. Burkan, according to the reports in the daily papers. They were perfectly pleased—delighted—with what Mr. T. P. O'Connor had done for them. Now let us see what he did for them.

The very last clause of the bill—oh, I might say that Victor Herbert was also at that dinner, according to the press reports. Am I right, Mr. Burkan?

Mr. BURKAN. He was there, yes.

Mr. CROMELIN. The treasurer of the Æolian Company—

Mr. BURKAN. We were all there.

Mr. O'CONNELL. They were all there, Mr. Burkan says.

Mr. CROMELIN. And the treasurer of the Æolian Company.

Mr. O'CONNELL. And the treasurer of the Æolian Company, Mr. Votey.

This bill goes on to provide penalties for pirating musical compositions, and then says:

*Provided*, That the expressions "pirated copies and plates" shall not, for the purposes of this act, be deemed to include perforated music rolls used for playing mechanical instruments, or records used for the reproduction of sound waves, or the matrices or other appliances by which such rolls or records, respectively, are made.

Now, gentlemen, judging from precedents that have been established by this wonderful association of music publishers, if you pass a bill or report a bill with that identical provision, specifically stating that music rolls and means for reproducing sounds are not infringements of copyrights on the music—I say, if you pass a bill of that kind—I have not the slightest doubt but what the music publishers and Mr. Burkan will stand as nobly by you as they did by T. P. O'Connor. [Laughter.]

Mr. FURNISS. Mr. O'Connor has not finished yet; he has more work to do, sir.

The CHAIRMAN. Do you favor the provision suggested by Mr. Pound?

Mr. O'CONNELL. I was not able to take down in full the provision that Mr. Pound suggested.

Mr. CURRIER. It was practically what you have just read.

Mr. O'CONNELL. Why, unquestionably we could not object to that, and we would not.

Mr. CURRIER. That proviso?

Mr. WALKER. I do not think you understand the royalty provided.

Mr. CURRIER. The royalty provided a provision by which the owner of the copyright might exclude anyone from reproducing the music by mechanical means; but if he opened it to anyone he should open it to all on the payment of a royalty of 2 cents.

Mr. O'CONNELL. Yes.

Mr. CURRIER. That was Mr. Pound's suggestion.

Mr. O'CONNELL. As I stated to the chairman of the House committee, when I had the pleasure of meeting him on my arrival in Washington last week, the houses that I represent have considered this question from every possible standpoint. Their object is solely to be protected in their legitimate business interests. They are engaged in

a legitimate business. They so feel. They will fight for that position. All they want is that they be kept in that position. They do not want to be turned over to the tender mercies of pirates. I use the word advisedly. My clients are not the pirates. They do not want to get control of any ship and scuttle it for their own good. They want to be protected in their own business interests. A fair field and no favor is what they want and what they ask, and what they have been insisting and telling me that you gentlemen will give them, and nothing else.

Mr. CURRIER. A fair field is given to them by Mr. Pound's amendment, is it not?

Mr. O'CONNELL. Yes, sir. Now, I want to make this as emphatic as I can, sir. As I told you in June here, if you decide that you have the constitutional power to pass this bill; if you decide that you want to take the lead in making laws for England and for France and for Germany and for Switzerland and for Belgium, then my clients are willing to pay a royalty, but under protest. It must be a small royalty, and the field must be open to everybody. We do not want to be ground between the upper and the nether millstones of the contract of the *Æolian Company* with the publishers on one hand and the contracts of the *Æolian Company* with the manufacturers on the other hand. That is their position, sir; and I am authorized to make that statement to you here. But I wish to impress upon you again the fact that I do not think you ought to pass legislation of this kind where the countries in which the question has been brought up have, one after another, declined to pass any such legislation.

Take Germany, for instance, they try here to have you reverse the order of things in Germany. In Germany a court held that these devices for reproducing sounds were an infringement, and within a year the legislative body of the German Empire passed a bill saying: "They are not infringements. We will protect the industries we have here." They want you, on the other hand, to assume this position: Our courts say it is not an infringement, and now they want you to say it is an infringement. The Swiss, at the Berne convention, absolutely refused to permit music-box disks to be called an infringement of the musical notation sheet. The French—you have heard described to you what a peculiar law they have on the subject, and you have seen how it works out.

The CHAIRMAN. What do you mean by "the musical notation sheet?"

Mr. O'CONNELL. The ordinary sheet of music. I say a music-box disk is not an infringement of a sheet of music, and that is what they have held.

If we are to follow the law anywhere, we ought to follow the law of England, the fountain head of all our law. They speak the same language; they have the same ideas—on some things. This question over there has not been passed by a snap judgment. You have heard many of the proponents of this bill tell you it took them eight years to decide on it. After the eight years, what happens? They give good remedies and proper remedies to the publishers of music for pirating, but they say specifically: "We will not interfere with the rights of those people who have money invested in the legitimate business of reproducing music by means of mechanical appliances." And here, in the home of those mechanical appliances, the country



which made every single one of them possible, without the inventions of whose men they would be impossible to any country under the sun, they now seek to tell you that you must recede from that position, and you, the fountain head, must say: "Every country lets these things in free, but we here, the home of them, have different ideas"—simply because this wonderful association of music publishers asks it. Look down the list. Did you ever hear of any of them before, gentlemen, as having a place even in the business of the country? Is there a single one of them that any one of you could recall by name or ever heard of before? Are they men of standing and place and position in the community—these music publishers? Did you ever hear of them? They put forward John Philip Sousa, who is known to everybody and loved by everybody, to take their chestnuts out of the fire. [Laughter.]

You may laugh, gentlemen of the opposition, but I am sure the committee does not laugh at it, and I am not speaking of these things as a laughing matter, but because I am here commissioned to speak for the business men I represent, and because I am speaking what I feel.

Mr. LEGARE. Mr. O'Connell, not exactly along the line of your argument, but for the purpose of information, what about the renewal of copyright? Is it possible, by making certain changes in one of these compositions, to get a renewal of copyright?

Mr. O'CONNELL. Under this proposed act, sir, you can do almost anything—you can change three notes in a piece and get a new copyright on it.

Mr. FURNISS. The present act is the same.

Mr. LEGARE. We have here in paragraph (g) a provision that only such products as shall be copyrighted after this act shall have gone into effect shall be covered. Would it not be possible to take all of the compositions that are now being used by your companies and have them changed slightly and copyrighted after this act went into effect, and take them away from you in that way?

Mr. O'CONNELL. I will answer this question in this way, sir: You will find that this is a most extraordinary act, or proposed act, when you read it all the way through. It starts out fair and square, and they do state specifically in the section you have quoted that it refers to compositions composed after this act goes into effect. However, you take section 6, as I pointed out to Mr. Currier earlier in the evening, and you will find that it says:

Additions to copyrighted works, arrangements, or other versions of work, whether copyrighted or in the public domain, shall be regarded as new works subject to copyright under the provisions of this act.

Mr. LEGARE. That is exactly what I want to know.

Mr. CURRIER. Mr. O'Connell, let me ask you what you say to the words in line 20?

Mr. O'CONNELL. Of which page, sir?

Mr. CURRIER. Right there in section 6—"or be construed to grant an exclusive right to the use of such original works."

Mr. O'CONNELL. "But no such copyright shall affect the force or validity of any subsisting copyright upon the matter employed, or any part thereof, or be construed to grant an exclusive right to such use of the original works." That may be—

Mr. CURRIER. That leaves the original works open to anybody else who wants to use them.

Mr. O'CONNELL. That may be all very true, sir; but then you will have a multiplication of copyright on a piece which perhaps is now in the public domain. They may make a little change here and a little change there and a change in the next place, and the result is—

Mr. CURRIER. All that is copyrighted, then, is the change.

Mr. O'CONNELL. I know, but pardon me, sir. They put out this new arrangement of old work with the copyright notice, and under this act that copyright notice would be a perfectly legitimate one, and the result is that it scares away people who have a legitimate right to use it; because you know yourself, sir, what an effect it has on the public generally to have the words "copyrighted" or "patented" on anything. The mere claim of patent or copyright itself is sufficient to deter anybody else from using it.

Mr. LEGARE. It has been argued here, Mr. O'Connell, that this act will not touch these masterpieces, such as "O Promise Me" and "Stars and Stripes," and products of that kind; but you say that they can be slightly changed and renewed and then they will come under this act?

Mr. O'CONNELL. Do I understand you to mean, sir, that that work, "O Promise Me," which is subject to a present copyright—

Mr. LEGARE. Copyrighted in 1889, I believe.

Mr. O'CONNELL. That they can not get a copyright on a music roll cut from it now? Is that what you mean?

Mr. LEGARE. No; but is it not possible under this act—

Mr. CURRIER. At the expiration of the term.

Mr. LEGARE. At the expiration of the term, that they can renew it?

Mr. O'CONNELL. Why, the act specifically provides for it.

Mr. LEGARE. That is what I say. In other words, that act does affect you so far as you are concerned?

Mr. O'CONNELL. Yes.

Mr. LEGARE. It does affect everything in existence to-day?

Mr. O'CONNELL. Yes; this act provides that all existing copyrights at their expiration may be extended to the duration allowed for copyrights by this act.

For instance, assuming that "O Promise Me" is an original composition [laughter], at the expiration of the twenty-eight years they could take out an extension under this act, which would extend it to the life of Mr. De Koven and fifty years beyond.

Mr. LEGARE. And then you would be compelled to pay a royalty under section (g)?

Mr. O'CONNELL. Yes, sir; if the act goes into effect to-day, and they cut a music roll from that to-morrow, nobody else can cut it.

Mr. LEGARE. Certainly.

Mr. O'CONNELL. In other words, it extends the life of the old copyright; and for all copyrights existing it enlarges them so as to include these mechanical reproductions. And I suggest in that particular that if you do pass any kind of a musical copyright act it should provide specifically that it should only cover compositions composed, published, and copyrighted after this act goes into effect, and it should only include reproductions taken from such musical works.

In that connection I want to call the attention of the committee to something which may be of interest, and that is this: That Mr. Serven, representing the Music Publishers' Association last June—

The CHAIRMAN. Mr. O'Connell, not excluding the interruptions, you have occupied fifty minutes.

Mr. O'CONNELL. Well, sir, of course if my time is up, it is up.

The CHAIRMAN. How much longer did you wish to speak?

Mr. O'CONNELL. You see, sir, it is so very hard to follow out a logical line of argument when there are all manner of interruptions and all kinds of questions asked. The argument that I had mapped out I could have delivered in thirty minutes here. The interruptions and questions of all kinds that were thrown at me simply threw me back again.

The CHAIRMAN. How soon can you conclude without interruption?

Mr. O'CONNELL. I could conclude in ten or fifteen minutes.

The CHAIRMAN. Can you conclude in ten minutes? That will permit us to adjourn at 11 o'clock.

Mr. O'CONNELL. I will conclude in ten minutes or five minutes, or conclude now, if the committee say so.

The CHAIRMAN. We will give you ten minutes.

Mr. O'CONNELL. All right, sir.

It was stated, in answer to one of my arguments made here in June, that Mr. Serven would propose an amendment to that section of the copyright act—section g. He did; but he proposed it in such a way that whereas it reads now that it covers compositions published and copyrighted after the act takes effect, he took out the words "published and," so that it should read "copyrighted after this act goes into effect." You can see the object of that. I consider that that was hardly keeping faith with either the members of the committee or myself.

A number of things have been said about the ability of Congress, the right or the power of Congress, in case it passes this bill, to impose a universal royalty. The language of the Constitution is "that Congress has the power," etc., "to pass bills giving the exclusive right to authors in their writings."

I think it will not be questioned by anybody that under our Constitution and laws there is no such thing as a natural right in a writing or in an invention. It was said by some of the gentlemen here earlier in the week that there was a common-law right of copyright prior to the Statute of Anne. That is not so. There was a royal prerogative in reproductions prior to the Statute of Anne, and there could be no reproduction without the grant of the Crown. That was the situation prior to the Statute of Anne. That statute granted rights to authors, and that is the basis of our Constitution and laws to-day. The framers of the Constitution decided that there were no natural rights in authors and inventors. If they had the natural rights there would be no necessity of passing laws giving them the rights. There is no necessity for passing a law giving a man anything that he already has. And in the same way it has been suggested here that as a matter of fact the authors have the right now, but that you are merely securing it to them, as Mr. Bowker said. If they have the right, then why in heaven's name do they want you to pass this bill? Is not that a complete answer to it? If the property right exists, what is the necessity for this bill? If music rolls and the like are infringements of their copyright, if they are copies of their writings, what do you want this bill, this section (g), or this new amendment of section (f), for?

Now, gentlemen, in passing this bill or any bill extending copyright to a musical or a mechanical means for the reproduction of sound, you are creating a new property right.

Now, in my opinion, this is the situation: There is a provision in the Constitution which states that the liberty of contract shall not be abridged. That relates to the citizen's right of contract as regards his recognized natural rights. If you, the Congress of the United States, create a new property right, why have you not the power to annex to that new right any condition that you deem wise? That is my answer to the criticisms of those who say that, while you have power to pass a bill making music rolls and the like copyrightable or infringements, you have not the right to annex the royalty feature. I submit, sirs, that you have. Where you grant the right, you can annex any condition to it you choose. If, as a condition of these men taking that right, you want to impose a universal royalty feature, you can do it. I am not saying in this that you have the right to pass any bill which extends copyright to music rolls and such devices; but I say that if you decide that you have that power and say you will go ahead and pass such a bill you will create this new property right, then I say you have the further power under the Constitution of annexing to it any condition that you choose.

Now, I have a criticism to make on Mr. Burton's bill, and that is that the third paragraph of his bill seems to confer the copyright in reproductive devices upon the first maker of that device.

MR. CURRIER. Mr. O'Connell, that was not his intention; and he showed me yesterday an amendment which would take care of that.

A GENTLEMAN. He put it before the committee.

MR. O'CONNELL. I think that the amendment that he proposed would be more full and complete if in the first two or three words from where he says "the arranger" he would say "each and every arranger." I think there could be no question then as to what he meant.

Now, on the question of the amount of royalty that you ought to set down as reasonable, 2 cents has been suggested.

MR. CURRIER. That is on perforated rolls?

MR. O'CONNELL. Yes, sir. I asked Mr. Furniss to-day what was the usual, the reasonable, the average royalty, and he answered me by telling what was paid John Philip Sousa. I have been credibly informed, on the best authority—

MR. FURNISS. And 10 per cent to others.

MR. O'CONNELL. That John Philip Sousa gets a vastly larger royalty on his compositions than any composer in America to-day, and my authority is John Philip Sousa.

MR. SOUSA. Very good authority.

MR. O'CONNELL. Now, do not forget, gentlemen, that a very old song that you have all heard, called "After the Ball," was hawked around the United States for a long time before anybody would publish it. It was offered to one house for \$25, and they would not touch it; it was offered to another house for \$10, and they would not touch it. Finally Harris said: "By Jove, I am going to print that myself," and he made \$150,000 out of it. It is very hard to determine those things, you know. The vast majority of the publications those music publishers get, I will venture to say that they do not pay on an average of \$10 dollars for.

Now, our difficulty here is that while we are dealing with a subject that involves the whole United States, and a vast multitude of composers and others, we have got before us as object lessons the great

leaders, the great successes, to show to you the wrongs of this wonderful Music Publishing House Association.

I ask leave, seeing that my time has been curtailed, to submit written amendments, and if in going over the record I want to submit a brief on the subject, I ask leave to do so.

The CHAIRMAN. How much time do you wish to submit your brief?

Mr. O'CONNELL. I do not know, sir, how soon I can have this record of your proceedings. I do not know how soon it will be printed. The last time you were very, very prompt; you had it in a few days.

The CHAIRMAN. Can you submit your amendments and your brief by next Monday?

Mr. O'CONNELL. I will submit my amendments by next Monday. As to whether I will have the record from which to write the brief is another question.

Senator SMOOT. Mr. O'Connell, I would like to ask you a question. Have your companies any objection whatever to the extension of the life of a copyright? Just answer that in a few words.

Mr. O'CONNELL. I can not do so in a few words, but I will make it as concise as I can. I listened to the argument of Mr. Clemens here the other day, and he put up a very splendid argument on that question. His statistics—and I assume they were correct—were very good.

Now, if, as a matter of fact, a man does create a wonderful composition which will live for ages, I see no reason why he should not have a long copyright on it; although, of course, contradistinguished to that, we have the rule laid down by the legislature that seventeen years is long enough for the life of a patent. Of course, by analogy—and there is a great analogy—I can not see why one should be longer than the other. But I can see very good reasons, as Mr. Clemens explained, why the copyright should be extended.

Senator SMOOT. I can see a great deal of difference between a patent and a copyright, and I suppose you can; but I have not time to go into it to-night.

Mr. O'CONNELL. Then, again, the manufacturers say, "Why should it be so in regard to inventions? We have spent our time, we have spent our money in experimenting, and it takes a lot of money to experiment," etc. But the author, on the other hand, goes into his back room and he simply lets genius flow. There is no effort, no expenditure of money, no expenditure of time. [Laughter.]

Senator SMOOT. That is about the only thing that does flow, too, in a great many cases. [Laughter.]

Mr. O'CONNELL. Well, he has the satisfaction of being a genius, at any rate, Senator Smoot.

The CHAIRMAN. Mr. O'Connell, we conclude that your familiarity with the subject makes it unnecessary for you to have the record before you, and if you wish to file a brief, will you please do so by next Monday?

Mr. O'CONNELL. That is very pleasing, Senator, but it scarcely meets the practical side of the matter. I thank you for the compliment, of course.

Mr. BOWERS. Mr. Chairman, can I have just one moment, please, sir? I would like to have the record show, if you please, that the corporation of Lyon & Healy, of Chicago, is not a stockholder in the Æolian Company, of New York.

Mr. WEBB. Mr. Chairman, I move that we adjourn until to-morrow at 11 o'clock.

(The following is the letter submitted by Mr. O'Connell in the foregoing statement:)

DEPARTMENT OF THE INTERIOR,  
UNITED STATES PATENT OFFICE,  
Washington, D. C., June 21, 1905.

HON. HERBERT PUTNAM,  
*Librarian of Congress, Washington, D. C.*

DEAR SIR: My attention has recently been called to the suggestion made by Mr. Thorvald Solberg, register of copyrights, in his preface to the publication entitled "Revised Statutes relating to Copyrights," published in 1904, where he says:

"It would seem, therefore, that the time has arrived for the consideration of the need for a thorough revision of our copyright laws. The subject ought to be dealt with as a whole and not by further merely partial or temporizing amendments. The acts now in force should be replaced by one consistent statute, of simple and direct phraseology, of broad and liberal principles, and framed fully to protect the rights of all literary and artistic producers, and to guard the interests of other classes affected by copyright legislation."

In this connection I wish to call your attention to the fact that the existing provisions of the copyright laws (Rev. Stats., sec. 4952) the laws relating to design patents (Rev. Stats., sec. 4929), as amended May 9, 1902, and the act of June 18, 1874, relating to the registration of prints and labels in the United States Patent Office, have the effect to confuse the boundaries of these subjects and to so mingle the jurisdictions of the Librarian of Congress in the registration of copyrights and of the Commissioner of Patents in the issuance of design patents and registration of prints and labels as to result in confusion. I believe the time is opportune to make a careful and accurate delimitation of the respective fields of copyright and of designs in such way as to clear up the situation. Such clearing up should have the effect to make an exchange of jurisdiction between our respective offices.

To illustrate the necessity for an improvement in the existing laws in this regard, I beg to call your attention to copyrights registered relating to the plastic arts for the purposes of exhibitors at the St. Louis Exposition. A beautiful sheet of cuts illustrating these copyrights is contained in the recent bulletin of the Chamber of Commerce of Paris, No. 19, May 13, 1905.

The suggestion which I wish to make is this: That the subject of intellectual property in the United States ought to be covered by three distinct and separate systems of law, to wit, copyrights, artistic designs, and useful inventions. The first is the proper field of copyright, and this, to my mind, should be restricted to writings, maps, and pictures. These three subjects may be characterized as representative art. The next field, that of artistic designs, relates to creations of an artistic character, ornamental in the effect produced, and embodied in and presented by some physical structure. This class of property is actually presented by the embodiment in which it is used, and it may be called presentative art, rather than representative. I would say, in this connection, that there is to my mind no effective distinction to be drawn for the purposes of a system of law between those objects which may be called creations of pure art and those other objects involving art, but applied to articles of utility. To illustrate, I would say that a beautiful vase may be contemplated as an object of pure art or it may be utilized as a receptacle, at the will of its possessor, and that this employment does not, to any degree, affect the nature of the concept embodied in it and whose creation is thought worthy of the reward of a system of law. The third field, that of useful inventions, is to-day accurately limited by the terms of the Revised Statutes, section 4886, covering this subject-matter, and this field contains all inventions embodying any utility of an operative or functional nature. Since the revision of the design patent law, by the amendment of May 9, 1902, these two statutes limit their respective fields to those characterized as useful inventions, section 4886, and ornamental inventions, section 4929.

Continuing now for a moment the line of thought relating to artistic or ornamental designs, I would say that neither the degree of art involved nor the use to which the object is applied should be considered in the operation of this statute, provided that some intellectual creation is present to bring it within the constitutional term "invention."

For the same reason I am of the opinion that prints and labels, now registered in the United States Patent Office, but under a special provision of the copyright law, should be placed under the control of the office charged with the administration of copyright.

They are differentiated from the general subject only by the limitation that they are "designed to be used for any other articles of manufacture." This limitation to their contemplated use is not intrinsic to the thing sought to be registered, but is extraneous, and if any property right is to be acquired through merit in these creations, the contemplated use should not be regarded by the statute.

The field of intellectual property comprehends the three subjects of copyright, artistic designs, and useful inventions. These three classes of intellectual property should always receive separate treatment by the laws, on account of the intrinsic differences which their embodiments present; although all arising primarily in concept, the embodiment in which they are utilized makes the field of copyright primarily that of the protection of authors in their writings, the language of the Constitution. Any map or chart is a picture writing, and for the same reasons dramatic and musical compositions belong here. Pictures, in the broadest sense of this term, should be protected by this same system, for they are representative art, a creation portraying things not present. These subject-matters so clearly define a special field, and this field is so high in its purposes and aims, that it may well be called the field of instruction, characterized principally by the dissemination of knowledge, and only in small degree and incidentally thereto by commercial propositions. It is the highest and noblest field of intellectual property. At the other extreme lie useful inventions, which are in their origin intellectual creations, as they are embodied concepts of new things, but as employed in human affairs their embodiments are utilitarian, and they universally enter into commercial projects. Between them lies the field of artistic property. I characterize this field as artistic in the essential nature of the creation and as ornamental in the result accomplished by its employment when embodied. The subject of artistic designs occupies an intermediate position between copyright and useful inventions in the commercial considerations involved, covering a field in which, in some instances the artistic thought is paramount, and those others where the commercial attractiveness of an object is increased by the inclusion of a small amount of the artistic product.

This is a field which deserves special encouragement at the present time in the United States. The activities of the American people have been largely exercised in the production of useful inventions; they have been employed in very small degree in the production of artistic creations. The field for the introduction of this artistic embellishment is practically endless, since every object utilized in our daily life may be the receptacle of such creations. To illustrate the particular field of employment of such creations I would say that stoves, furniture of all descriptions, table service, carpets, wall papers, woven fabrics, as well as articles of jewelry and architectural fittings of all kinds, are a few of the things in which the results of this intellectual activity are embodied.

I beg to call your attention to the fact that there is no practical limitation between the objects of pure art and of applied art, as we reach the consideration of this subject for the application of a system of law. A statuette may be pure art, but if placed upon a table it may be a paper weight. It might be said that if the owner desired he might anchor a boat to it, but the thing is the same. A statue is none the less a statue if used as a caryatid or if it is made to serve the purpose of a lamp holder.

It is for this reason that I conclude that the concrete embodiment of an artistic concept, physically presented, is presentative art and should be protected, if at all, by a system of protection for the artistic design involved and not within the field of representative art, which is the true field of copyright.

In conclusion I will say that to my mind the contemplated revision of the copyright law should be made with a view to resuming jurisdiction over the subjects of prints and labels, now transacted by the Patent Office, and that the registration of designs should be left to the design patent law, which in its present form covers "any new, original, and ornamental design for an article of manufacture," and consequently can afford adequate protection to the subject-matter. I will say that I believe, in connection with your revision of the copyright law, that statutes relating to the protection of designs should be liberalized, in order that a necessary and effective stimulus may be given by a beneficent system of law to the inventive genius in its progress in this direction.

I beg to assure you of my hearty interest in your proposed improvement in the copyright law, and I remain,

Yours, very truly,

F. I. ALLEN, *Commissioner.*

COMMITTEE ON PATENTS, U. S. SENATE, -  
*Washington, D. C., December 11, 1906—10 o'clock a. m.*

The committee met at the Senate reading room, Congressional Library, jointly with the House Committee on Patents, and was called to order by Chairman Kittredge.

The CHAIRMAN. I do not know whether Mr. Mauro has arrived or not. The other one who particularly requested leave to address you was Mr. Tams, whose request was for thirty minutes on certain provisions, including these. Mr. Tams is here, returned to Washington to be heard.

Mr. O'CONNELL. Just a moment. I beg to state that Mr. W. W. Connor, of the Kimball Company, Chicago, was here the other day. He authorized me to say to this committee that he and his concern—some of the members of the committee know what concern it is—are absolutely and in every way opposed to paragraph (g) or any form of it. He also instructed me to say that he personally does not agree with the royalty feature.

The CHAIRMAN. Mr. Arthur W. Tams.

Who do you represent, Mr. Tams?

Mr. TAMS. I represent myself and the A. W. Tams Music Library, the Authors and Composers' Music Publishing Company of New York, the Church Choir Musical Library, Boston.

Now, Mr. Chairman, and gentlemen of the committee, I am not a lawyer; I am a simple business man, and I trust you will pardon any breaks I may make. I will be as swift in my remarks as possible. I was granted half an hour, and I will stop within the half hour, and if I have anything further to say, I will supplement it in writing. Great stress was laid, gentlemen, last week, on the necessity of public libraries and their benefit to the public. Now I wish to lay great stress upon the necessity of music libraries. I operate the largest music library in the world; I am the only real music librarian in the United States, and I am a very large distributor of music. This bill vitally affects my business. Paragraph b of section 1, with the words "to sell, distribute, exhibit, or let for hire," will close my library and every other library. I was told by one of the music publishers those words were put in for that specific purpose. A gentleman connected with one of the largest music publishing concerns in New York called at my office last week, and, in the course of the conversation, he said: "The Committee on Patents favorably reported an amendment last spring to section 4966 of the Revised Statutes," he says, "and we do not expect to be able to stop the rental of music to church choirs, public schools, and vocal societies," he says, "but he said we have to put into that copyright bill some words that will stop the orchestrating of music, and that will stop the whole business. When he left my office I looked through the bill for the joker, and I find it in clause f, section 1, in the word "arrangement." That word also appears in section 6—"arrangements." Now that word, gentlemen, technically in our business, means "orchestral arrangement."

Now, I wish to go back before going to that question. There are in this country about 3,000 vocal societies, with an average membership of about 100, which means 300,000 people. There are about 20,000 church choirs, with an average membership of about 15; that is 300,000 people. And the members of the public schools, I do not



know how many—I have not had an opportunity to look at the statistics in the census, you are better posted on that than I am—but all the children in the public schools use music. On the last day of the year they give a little concert. The schools that have a small appropriation are compelled to either borrow the music from other schools or rent it; they can not buy it. That applies to church choirs. Out of 20,000 church choirs there are 10,000 so poor they can not possibly buy the music, and out of 3,000 vocal societies there are about 500 who are compelled to borrow or rent the music. One of the reasons they are compelled to rent or borrow the music is because of the enormous price that is put by the music publisher on the new works. Now, here is a copy of the Creation.

The CHAIRMAN. Mr. Tams, at some of the hearings during this session an amendment has been proposed to section (f) which will limit its application to public performances for profit.

Mr. TAMS. Yes.

The CHAIRMAN. Would that eliminate your objection?

Mr. TAMS. No, sir; it would, and it would not. I will tell you why. The poor vocal society of the little country town is composed of the cash girls in the stores, and the boys in the shops or from the farm, and as they meet once a week to study a new work it takes a long time, and after three months of rehearsal they give a performance. Now, the few pennies they have they have to spend, first, for the musical director, and they have to pay the rent of the hall, and they have to pay an orchestra to give the performance, at the end of three months. Now, nine times out of ten the performance is given at a loss, but if there should be a little profit it goes to some charity or church, or the organ, or something of that kind. If there are a few pennies profit, of course it would be profit; but in the majority of cases the performance is given for pleasure only. In the case of church choirs they are never given for profit. They sing their music on Sunday for the praise of God; no profit in that. And there is no profit in the public schools. That is given in the course of education.

Senator CLAPP. Would not this suggestion relieve the church choir?

Mr. TAMS. It would relieve the church choir, and it would relieve the public schools, but it would not relieve the poor vocal societies in all cases.

Mr. CHANEY. If the poor vocal society gave a public performance of it without any idea of profit, it would relieve them.

Mr. TAMS. Yes; it would relieve them in that case. Now, I come back to this Creation. There is a work of 154 pages. That forms an entire evening's entertainment. That book is in the public domain. It can be printed for about 10 cents a copy, and it is sold in quantities at 20 and 25 cents a copy, but even at that figure these poor societies can not buy it. Now, here is Frankenstein, published in Belgium, 21 pages. That book, if I owned the copyright, I could print for 2 cents a book. The price is \$1.50, the lowest price. With 50 per cent, and 25 off, brings it to 57½ cents. That will take only ten minutes to perform, and they have to pay 57½ cents for it. That is the reason that they can not buy it; they must rent.

I would like to read to you a letter I received from Paul B. Morgan, president of the Worcester Musical Association, Worcester, Mass.

This is the most important musical society in the United States. It has 400 members, and they hire the Boston Symphony Orchestra every spring, and the Metropolitan Opera House, and go at an enormous expense—thousands of dollars for each performance, yet even this organization can not go further; they have been under the necessity of renting the music. Mr. Morgan's letter reads:

Mr. A. W. TAMS.

DEAR SIR: Replying to your favor of the 1st instant, I beg to say we are in sympathy with you in the position you are taking, which will make it possible for our smaller music associations to rent copies of music which they will use. I feel I have no authority to authorize you to represent this association in the hearing before the joint committee of Congress, which will be held in Washington on the 7th and 8th instants, but will say that in my opinion the lives of many of our smaller musical organizations will hang upon the decision which is reached in this copyright law.

Yours, very truly,

PAUL B. MORGAN.

I would like to have that in the record.

The CHAIRMAN. Have you under the existing law a right to rent out that music?

Mr. TAMS. Yes, the existing law says nothing about prohibiting it. I have a right to do what I like with it.

Mr. CURRIER. Why, then, did you have a bill introduced in Congress providing for a law—

Mr. TAMS. I am glad you mentioned that. Section 4966, Revised Statutes, was placed in the statutes for the specific purpose of protecting dramatic productions, and musical productions, such as operas, farces, comedies, musical comedies, extravaganzas, etc., many of which I owned, and that law was intended to protect my property. The prompt book is never printed. It is always held in manuscript. But the score is always printed. For many years after that law was passed nothing was ever heard of it. I think it was put on the statutes in 1897. It was never intended to cover oratorios, masses, choirs—religious music. And the proof of that is that Mr. Schirmer, one of the largest music publishers in this country, as late as 1901, said when he was in my store: "We are very jealous of your library. We are aware you are doing a perfectly legitimate business, but we are jealous on account of the large amount of that business." Now, if he had known about that clause, about the provision which would prevent the renting of music, he would not have said those things to me. It was only up to a year ago the publishers found out that clause was so broadly worded that the words "musical composition" could be twisted to cover everything on the face of the earth that had music in it. And they used that clause as a club over the societies. They sent circulars out which were introduced at the hearing last spring in which they went as far as they dared to under the law, holding that clause up over the heads of the choirs and vocal societies, and said to them: If you use a single copyrighted piece of music, if you borrow or hire the copies to give your performances, we will convict under clause 4966 and put you in jail. They did not use the word "jail," as the circular was worded very ingeniously by a very smart lawyer. They said that, but not in so many words. They said under that they could be subjected to a criminal prosecution, and to relieve the societies from the music publishers using that clause as a club over these societies, I advocated the amendment

which provided that the societies should have a right to give performances from hired or borrowed copies.

Mr. CURRIER. Isn't there a suit in court now?

Mr. TAMS. Yes; there is. I immediately brought suit against the publishers for \$250,000 damages, for intimidating customers. I have hundreds of letters from choirs and clubs, protesting against this and asking us to go to Congress to protect them against the music publishers. Now, the music publishers have stated that the reason they objected to the societies and choirs using the music in giving performances from hired copies is that it takes away from the music composer's royalties. Now, that is not the fact. Let us see how that works. A musical society will send to a music library to hire 100 copies of a work. The library must buy that 100 copies from the publishers and pay for it. The composer gets his royalty from that. The society starts the rehearsal and they send on to me, saying, "Send us 25 new copies. Some of the well-to-do singers want to buy them." I buy 25 more and send on. The composer gets his royalty for them. After a time we get another letter: "Send 50 more new copies to sell to the audience." They are sent on. After the music is returned to me it will be 25 copies short. That is the proportion. Some of the boys and girls keep them for mementos. They have to be paid for. And, besides that, the local music stores will sell copies of that work to the inhabitants who have fallen in love with it at the performance, and that will result in 25 or 50 copies more being sold from that town; 250 or 300 copies in all from that town. Now, if the library is fortunate enough the following year to rent out that same work, it has to buy 25 more copies to complete the 100, and so the process goes around the country ad infinitum. Now, that does away with the statement that the music composer is robbed of his royalty. His work would not be heard of if it were not for the societies that hire the music. And the proof that the composer does not object to it is shown by this letter from Mr. Jules Jordan, a very well-known composer of Providence, R. I., and a very prolific writer:

PROVIDENCE, R. I., *December 6, 1906.*

My DEAR Mr. TAMS: I can not spare the book you sent, the conductor's book, for I need it at the rehearsals. Can't you send a first violin part, and I will compare the cuts in that with those in the conductor's book. I can do that to my own satisfaction, and then return the part at once. I dare say the cuts will agree, but I want to make sure.

Yours, truly,

JULES JORDAN.

P. S.—C. W. Thompson, music publisher, Park street, Boston, has just issued a new mass of mine, for which you probably will have a call sooner or later from two of the societies I conduct. Of course I am willing to have rented copies used.

These composers, as a rule, are conductors of several societies, and that is their principal mode of livelihood. They do not depend on what they compose for a livelihood. That is a side issue. They compose because they have to keep their names boiling before the public. It is a great inducement to have the societies perform their works, for it is on the strength of that they sell their work to the public.

Now we come back to clause f. A gentleman called to see me and suggested there were some words in the bill that would prevent orchestration. I looked through and found this word "arrangement." Now, gentlemen, I am prepared to state positively the

word arrangement technically means orchestral arrangement. That is the technical meaning of it in our business. For years, gentlemen, the church choirs throughout the world have made it a practice on Christmas, Easter Sunday, and other festival days to give special musical services. And in order to give solemnity to these occasions they invariably use the local orchestra with the choir and the organ. In order to use them, they have to come to me for an orchestration, which means separate music sheets. The orchestra can not play from the copies bought from the music stores. They have got to have specially prepared sheets, one for the clarinet, one for the cornet, and for the different instruments. After the performance those sheets have no commercial value. But under clause f, if this is enacted, and the choir gives its special services on Christmas or Easter, this music publisher can put in jail a whole choir, or the organist or the orchestra, and even the congregation, if they sing with them. [Laughter.] Now, there is a nice situation. But that is a fact. Now, I have been told that the publishers may say to you, We keep orchestrals on hand for the use of the choirs. They do not. They have a few, probably one one-hundredth of 1 per cent—hardly that; and if they have got them on hand they haven't enough for the different instruments. I have had calls for the orchestrating of the piccolo, the flute, the clarinet, the bass drum, all. It might be all the little town had, and they got it. I furnished it to them. Now that same word arrangement will affect all these people. It will affect the members of the church choirs, the members of the local orchestra, the military bands, the members of all local societies, German societies who give entertainments, and all the pupils of the public schools who give entertainments; it will affect them just the same. It affects everybody in the music business.

Now, I suggest, gentlemen, that in clause (b) the words "or let for hire" be eliminated. And in clause (f) and section 6 the word "arrangements" be eliminated. And in 4966 of the Revised Statutes insert the word "dramatic" after "musical" so as to read "musical dramatic productions." That will render that clause perfectly clear that it applies to theatrical performances, dramatic and musical, and not to religious music. And in section 5 insert the word "dramatic" after musical.

Now, gentlemen, we hear a good deal of what trusts are doing nowadays, but it has remained for the musical trust to endeavor, by this legislation, to penalize half the people of the United States and threaten them with the jail if they persist in giving religious services or little entertainments at night, and even the children singing in the public schools.

MR. CURRIER. As the bill now stands with the suggested amendments it would not have that effect; it would not affect schools and church choirs; it would affect no society that was not giving a public performance for profit.

MR. TAMS. Even if that little society made one dollar profit it would be affected. I maintain that the custom that has prevailed up to the present time should continue.

MR. CURRIER. But the public schools and church choirs would not be affected if the amendments are adopted.

MR. CHANEY. If this subsection (f) is to be modified, how would you modify it?

Mr. CURRIER. Would you strike out the word "arrangement"?

Mr. TAMS. If I were to have the phraseology of that, I would say, "To publicly perform a copyrighted musical dramatic work, or any part thereof, or for purpose of public performance, or the purposes set forth in subsection (b) hereof." I would stop there.

Mr. CHANEY. Make a period of that and strike out all the rest of that?

Mr. TAMS. Yes.

The CHAIRMAN. Is that all, Mr. Tams?

Mr. TAMS. That is all.

Mr. CROMELIN. May I interject one word? Mr. Tams has brought out very forcibly a new feature that affects our business. Talking-machine records are limited by time. There is no record made of any kind that does not require special arrangement and special orchestration; and if under this bill we received permission to make the record of the song, still the man who made the arrangement, unless specially permitted, might be sent to jail. I have a telegram, Mr. Chairman, from Mr. Philip Mauro. Mr. Mauro is engaged in court in New York Tuesday and Wednesday on an important case and it will not be possible for him to be here. I beg to inquire whether you can hear him at some future time?

The CHAIRMAN. The committee thinks Mr. Mauro should be satisfied with permission to file a brief. He may do that by Monday morning.

Mr. CROMELIN. I thank you.

*Memorandum of objections to the bill by Philip Mauro, of Washington, D. C.*

The writer addresses the committee as a patent lawyer, and as a stockholder, director, and the general patent counsel of the American Graphophone Company, the pioneer and leading talking-machine manufacturer of the world.

In the interest of brevity the writer's comments will be directed solely to those provisions of the bill which affect the manufacture, use, and sale of instruments for recording and reproducing speech and other sounds.

The bill doubtless contains many just and unobjectionable provisions looking to the benefit of authors and composers, and, so far from wishing to oppose such portions of the bill, the writer regrets that their enactment is jeopardized by the presence in the bill of a provision so radical, vicious, and repugnant to the genius and trend of the protective legislation of this country, as that known as "paragraph g."

NO NATURAL PROPERTY IN IDEAS.

Much of the argument by which it has been sought to support paragraph g is based upon a fundamentally wrong assumption, namely, that thoughts or ideas are property. There is no natural property in ideas after publication—i. e., after expression has been given to them. One may, of course, keep his thoughts to himself (and generally it were well for himself and others so to do), but the moment he has communicated them to the public they fall into the common fund, and there is nothing immoral, unethical, or a proper subject of animadversion, in thinking another man's thought, or in communicating it to others for their profit or entertainment. All talk about "dishonesty" and "theft" in this connection, from however high a source, is the merest claptrap, for there exists no property in ideas, musical, literary, or artistic, except as defined by statute. It is entirely a matter of convention or contract; and in framing legislation for the benefit of that worthy class of persons who devote their gifts and energies to the embodiment of intellectual conceptions in some useful, ornamental, or instructive form there are two parties to be considered, namely, the public and the producer; and it is the duty of our legislators to consider first the interest of the former, whom they represent, and whose servants they are.

Not only so, but the Constitution has with great clearness limited the object to which such legislation must be directed. It is not to benefit a special class of workers, however deserving, but to promote the progress of science and the useful arts. That is to

say, the interest of the public is to be considered as paramount; and the underlying theory of the entire patent and cognate legislation of this country is and has been, to shape such laws as will induce and stimulate the greatest quantity and best quality of intellectual output along these definite lines. As individuals the members of the committee may entertain kindly and liberal sentiments toward authors, composers, etc., but as legislators they can not properly be influenced by such sentiments to the enactment of any legislation which would not be clearly in the interest of the public.

The writer would not care to enter opposition to the real interests of the composers, and it is a source of satisfaction to him to know that, in attacking paragraph g, he is not opposing the interests of these public benefactors, but quite the reverse, although it has been artfully made to appear that paragraph g is in their interest.

#### MANY INTELLECTUAL CREATIONS UNPROTECTED.

To assist in stripping from the arguments advanced in support of paragraph g, the superficial plausibility with which it is invested by an insincere appeal to the supposed "rights" of the composer and author, we would point out that, of the enormous contributions added day by day to the common fund of ideas, but a relatively small number can find any monopolistic protection under the law. It is only when the ideas take the form of a literary or musical composition, or of an ornamental design, or of a useful improvement in an art, machine, or composition of matter, that they can be made the subject of protection under the laws. Ideas of treating diseases, of improving live stock, of producing new varieties of plants and flowers, of instructing children, of teaching the deaf and blind, of constructing houses and buildings, of landscape gardening, of conducting business enterprises in their manifold forms, and many other groups of ideas by which the public is benefited, are the fond objects of no protecting laws. Many and numerous classes of public benefactors continue ceaselessly to pour forth their flood of useful ideas, adding to the common stock of knowledge. No one regards it as immoral or unethical to use these ideas, and their authors do not suffer themselves to be paraded by sordid interests before legislative committees, uttering bombastic speeches about their "rights," and representing themselves as the objects of "theft" and "piracy."

Certainly it can not be contended in behalf of paragraph g that it is in the interest of the public, or that it has the slightest tendency to promote science and the useful arts. Such being the case it is improper legislation.

#### PARAGRAPH G VIOLATES CONSTITUTIONAL AND LEGISLATIVE LIMITATIONS.

As already stated, a patent (or copyright) is in the nature of a contract between the inventor (or author) and the public, whereby, in consideration of the benefits conferred upon the latter, certain exclusive privileges are granted to the former. Now, the Constitution states, the courts have defined, and the legislature has (for the most part) observed the limits of the benefits to be enjoyed by authors and inventors on the one hand, and by the public on the other, with reference to their respective writings and discoveries. Paragraph g proposes to disregard these constitutional and traditional limitations in two ways, first, by invading the rights of the public in respect of copyrighted musical publications, and, second, by invading the domain of the patent law and the rights of the public as defined thereby. In both these respects paragraph g is radical, novel, and highly objectionable.

The only constitutional question raised before the committee in the writer's hearing in regard to paragraph g was whether the term "writings" could be construed to cover a sound record, or a perforated music roll. That, in the writer's mind, is relatively a minor objection, though it may be said that the safe course for the Congress is to adhere to the constitutional term "writings" and to leave matters of construction and interpretation where they belong, namely, to the courts.

1. *Rights of composers and the public, respectively.*—The Constitution and laws of the land have, with great liberality to the author and composer, provided for exclusive rights to him in his writings, and this provision has, by harmonious legislative action and judicial interpretation, been always held to cover the graphic representation of the composition or that which represents the composition to the eye. The effect of this provision has been that, under a copyrighted composition, the public enjoys all the benefit that can be derived from the literary, musical, or artistic idea, while the author has the benefit of the sale of the copies by which the idea is set forth visually.

This line of division between the benefits to be enjoyed by the author and those to be enjoyed by the public is so clearly defined by the Constitution that it would seem difficult to overlook it. Thus, to apply the provision to the copyright of a musical

composition it will be apparent that the line drawn by the Constitution gives the benefit of the graphic signs to the composer and the benefit of the audible sounds to the public.

And we may observe in passing that this line is very happily drawn to secure the declared object of the Constitution, for the interests of both public and composer go hand in hand. The more widely the idea is disseminated, the more the public benefits from it, and the greater is the demand created for the printed copy. The advantage to the publisher of having the widest possible diffusion of the melody of a meritorious composition is so obvious and so abundantly demonstrated that it would never be relinquished for anything short of an unfair and illegal monopoly by which the public could be heavily taxed.

Paragraph g proposes to violate this fundamental distinction and to embrace within the provisions of a copyright not only the graphic representation of the composition but the devices, contrivances, and appliances designed to produce the sounds. That such a provision, if enacted into law, would violate the limitation defined above is too clear to require argument.

No one who gives the matter serious reflection will be misled by the specious argument that the above limitation would exclude books printed in raised type for the blind. Such books are graphic representations, and do represent the composition to the eyes of those who have eyes. Principles are not determined, nor should the course of legislation be controlled by reference to abnormalities.

At this point we would like the legislators to ask themselves this question: Will this radical departure in the copyright laws tend to benefit the public and to promote science and the useful arts? It is impossible, we submit, to give any but a negative answer to that question, and by that question the fate of the measure must, under the Constitution, be determined.

2. *Invasion of the domain of the patent laws.*—The objection to be considered under this head is of a very serious character. The Constitution not only draws a line between the benefits under a copyright to the composer and public, respectively, but it carefully distinguishes between authors and inventors and between writings and discoveries. To promote the development of the useful arts by the protection of novel and useful inventions is the province of the patent laws, and in this department of our jurisprudence there has come into existence a highly developed system and a great body of law and judicial interpretation, to which a very large part of the national energy and intelligence have been devoted. One who has the slightest appreciation of the part played by the patent system in the development of the industries which constitute the nation's boast will contemplate with much concern the proposed invasion of copyright legislation into the domain of the patent law.

One effect of this provision would be to bring and retain within the grasp of monopoly a large class of mechanical devices, representing enormous values, for a period of possibly a hundred years, as against the statutory period of seventeen years, which the experience of a century has shown to be ample. Devices of this class would thus become the subjects of radical and unfair discrimination.

This provision, coupled with other provisions of the bill, would introduce great confusion and uncertainty into the administration of the patent law, in that special procedures and remedies (exceedingly drastic and summary) are provided, which would thus become applicable to certain kinds of inventions and not to others.

It is difficult to foresee all the effects of a provision so radical, but we can not suppose that such an extraordinary measure, fraught with such possibilities for mischief, will ever be enacted into law, or that any unprejudiced person would, after fully understanding the matter, wish to embark upon so risky an experiment.

At the very outset of the discussion of this objection we would strongly urge that a provision relating to mechanical devices has no place in a copyright bill, and that it should be considered as an amendment to the patent laws, which in fact it is, since it covers devices performing mechanical functions and devices of that character only.

To indicate the great force of this objection it should suffice to point out that a "device, contrivance, or appliance" in order to be the subject of protection under the laws of the United States must be novel, and must undergo an examination as to novelty before it can receive that limited protection which the law allows. But by the provisions of this bill an important class of mechanical devices (whose development constitutes one of the greatest marvels and triumphs of inventive genius) becomes the subject of practically perpetual monopoly, without any regard to novelty, without any examination, without any oath of authorship, and without any of those safeguards which the law throws around the grant of patents for inventions. This objection could be greatly elaborated, and doubtless with profit, but limitations of time and space compel us to pass on to another point.

It is important to call attention here to the fact that the general aim and result of all mechanical inventions is to substitute automatic devices for human agencies, and "the progress of the useful arts" is measured by the extent to which this result is accomplished. Following the operation of this law some very notable results have been achieved during the past twenty years in the field of production of musical and other sounds.

While the copyright law was encouraging composers to bring forth their musical conceptions, the patent law, in its separate sphere, was encouraging the development of means whereby the benefit to the public of those musical conceptions could be greatly augmented and widely diffused among the great mass of the people. We have seen that under a constitutional copyright law the multiplication of copies belongs exclusively to the publisher, while the rendition of the composition, by whatever means, instrumental or vocal, and the enjoyment of the sounds produced, belongs to the public. The composers and the public alike were dependent a few years ago for the rendition of these compositions and for the production of the sounds which was their ultimate object entirely upon the human voice or upon instruments manipulated by human fingers. Hence there was a very narrow limit to the audible rendition of musical compositions, and the average quality thereof was very low, being determined by the skill of the human performer. Thus both the composer and the public suffered for lack of adequate rendition in quantity and quality of the copyrighted score.

In a few years the genius of the inventor has brought about a marvelous change in these conditions. Let it be said with emphasis and pondered with care that the composers and publishers have not contributed in the slightest degree to this change. They can justly claim no benefit from it; yet the publisher does not scruple to demand radical change of legislation in order to give him the entire monopoly of the benefits resulting from these changed conditions, and has the effrontery to apply vituperative epithets to those who venture to oppose his scheme of greed.

The change above referred to has been brought about by inventing automatic sound-producing devices to take the place of human fingers and vocal organs. No "rights" of the composer or publisher have been invaded or have been affected in the slightest. Their rights remain exactly as they were before. What has happened is simply that, under the operation of the patent laws, new means have been created whereby the benefits to the public of all musical compositions, copyrighted or not, have been enormously increased.

It requires only a fair and accurate statement of the actual situation (and no one can justly impugn the foregoing statement) to make it evident at a glance that it would be an act of gross injustice to take by special legislation any of the benefits of this inventive work from those who accomplished it and bestow the same upon the publishers who had no part in it. Much more so would it be to do, as paragraph g proposes, namely, to place the absolute control of these benefits in the hands of a publishers' trust, which, if not already in existence, would come into being immediately as the inevitable result of this feature of the proposed law. If it were designed to pass an act for the purpose of arresting so far as possible the beneficent effect of this new line of inventions, to divert the pecuniary results thereof to those who had not the slightest part in bringing them about, to levy a tax on all users of these new instruments, and to limit their use so far as possible to the comparatively rich, who stand least in need of them, it would be difficult to conceive of a measure better calculated to subserve these ends than paragraph g.

The benefit to the public which these new inventions have brought about is incalculable; and if the Congress were disposed to change at all the laws under whose influence they have come into existence, it should be with a view to increasing instead of arresting the spread of those benefits. No one can possibly fail to see where the interest of the public lies in this matter, and if there be need of any pertinent provision in the copyright bill it is one declaring explicitly that sound records and similar mechanical appliances are not "writings" (or "works of an author," if that strange, indefinite, and objectionable phrase be retained) within the meaning of the bill.

It is enough to show, in opposition to any claim of fair dealing in this part of the bill, that composers and publishers are not, and can not possibly be, damaged by the invention, sale, and use of automatic sound-producing appliances; but it can be further said that these appliances have been and are greatly benefiting the above classes of citizens, not merely indirectly as members of the general public, but directly in popularizing their compositions and greatly stimulating the demand for copies.

The effects of the invasion by copyright legislation of the domain of the patent laws would be very far-reaching, and of various sorts. Much study and effort have been directed to the object of defining carefully the limitations of the patent statutes, design statutes, and copyright statutes, and considerable headway has been made in that



direction. It is now proposed by paragraph g to increase to an unprecedented extent the confusion which the lack of clear delimitations has caused in the past, and deliberately to introduce into the sphere of the patent law provisions utterly at variance with the fundamental principles thereof.

We venture to suggest that the committee should hear the views of the Commissioner of Patents on the effect which this remarkable paragraph would have on the administration of the patent law. We find that the honorable Commissioner had made this subject the matter of a special communication to the Librarian of Congress in June, 1905, which letter contains a thorough analysis of the whole subject of intellectual property, dwelling particularly upon the great importance of a careful delimitation of the respective boundaries of copyright, designs, and patents. We call particular attention to this important letter, which, instead of being suppressed, should have been presented prominently to the committee at the outset, seeing that it was written at the request of the Librarian of Congress during the formative stage of the bill.

We understand that the Librarian assured the committee that in the preparation of the bill its authors had the benefit of the views of the Commissioner of Patents (see Rec., p. 5). The committee, however, could hardly be expected to infer from this statement that the bill was framed in direct disregard of the only recommendation upon which the Commissioner laid stress.

We submit that whatever may be the ultimate legislative fate of paragraph g it should certainly find no place in a copyright bill.

#### THE ELEMENTS OF VALUE IN A SOUND RECORD.

It will doubtless be helpful to the committee in meeting the clamor raised about the "rights" of composers (though the composers themselves give little countenance thereto) to consider the exact nature of a sound record disk or cylinder. A moment's consideration shows that it is not a graphic representation of the musical notation and that it does not and can not possibly serve as a substitute for a music sheet. It is a machine element pure and simple, having no other possible function or utility than to operate in cooperation with other mechanical elements to produce a purely mechanical result. By itself the sound record is absolutely without function or utility. In the production of sounds it can accomplish nothing without the reproducing stylus, diaphragm, feed mechanism, motor, and other parts which make up a complete graphophone. The resulting sounds are not the production of any one of these devices, but of the cooperative action of all of them.

The function of the machine as a whole is to impart vibratory motions to a small circular plate known as the "diaphragm," and the motions of the latter set up sonorous vibrations in the atmosphere. Consideration of these facts should make it clear that paragraph g is dealing with subject-matter quite foreign to the proper domain of a copyright bill.

Attention is now briefly directed to the fact that the elements of value which enter into a sound record differentiate it, not only from the proper constitutional subjects of copyright, but also from other mechanical devices which would be affected by paragraph g, such as the perforated music roll.

1. The music roll is a sheet or strip of paper on which the musical characters are represented by perforations whose length and relative position correspond respectively with the duration and staff position of the corresponding musical note. There is, therefore, a certain resemblance observable to the eye between the music roll and the music sheet of the corresponding composition, the former being followed in making the latter.

On the contrary, the groove of a sound record is the result of the cutting action of a stylus point operating under the influence of atmospheric vibrations. The staff notation is not copied or followed in any sense and there is not the slightest resemblance in the sound groove to the characters on the music sheet.

2. The music roll is made by an operation and by machines analogous to printing machines. The making of a sound record presents no such analogy, but, on the contrary, involves processes and machinery as different as possible from those used in printing sheet music.

3. The excellency of the music roll and the manner in which it answers its intended purpose is merely a matter of mechanical care and accuracy in its production. Its quality is not due in any degree to the artistic ability of the maker.

On the other hand, the sound record is the result of the physical action of atmospheric vibrations upon a prepared wax surface, the vibrations being permitted to direct the motions of a stylus point. The ultimate motive force in this operation is the human voice or an instrument or band so that the effect of the bill would be to interfere with personal liberty in the use of the voice or of musical instruments.

The merit of the record is due to other factors than the musical composition and the mechanical accuracy with which its characters are copied, namely: (a) To the artistic ability of the performer or performers. The sound record is a faithful reproduction of the individual performance and its merit popularity, and salability depend upon the reputation of the artist or artists and the excellence of their artistic rendition of the selection: (b) the excellence of the sound record depends upon the technical ability of the record maker, which is displayed in grouping the various instruments, adjusting the delicate recording appliances, etc.—the importance of this branch of the work is such that it also may properly be termed "artistic;" (c) the excellence of the sound record depends further upon the nature of the process and apparatus as a whole, whereby the fugitive sounds are caught in their brief existence, and, ere they die away, embodied in permanent form for subsequent repetition. Enormous labor and capital have been expended upon the invention and perfection of these processes, and instead of discouraging and circumscribing their use it were the part of wisdom to promote their use and to increase and cheapen, so far as possible, the output from them; (d) finally, these sound records serve as a sort of mechanical memory, preserving not merely a register of the particular musical composition, but the very tones of the voice of the singer, as given forth on the particular occasion when that special record was made.

We do not for a moment suggest that these differences are such as to bring the music roll within the realm of proper or desirable copyrightable subject-matter. Our opinion is decidedly to the contrary, and the above distinctions will serve their best purpose in showing that the attempt to find support for a provision that will cover music rolls is fallacious in its reasoning, since the supposed features of resemblance therein to the music sheet are totally lacking in the graphophonic sound records, which are analogous in their operation as machine elements to music rolls.

## APPENDIX.

I beg to print as an appendix a letter written by me to Senator Knox of, your committee, when I first heard of this copyright bill.

JUNE 2, 1906.

Hon. P. C. KNOX,  
*United States Senate.*

DEAR SENATOR KNOX: I have just received a copy of "A bill to amend and consolidate the acts respecting copyright," introduced May 31, and referred to the Committee on Patents, whereof you are a member. Am also informed that a hearing on the bill will be granted before the committees of both Houses on the 6th instant. As I do not expect to be in Washington on that day, I beg to call your attention to a feature of the bill, which, if enacted, would be highly prejudicial to my clients, the American Graphophone Company, and Columbia Phonograph Company, and to other important manufacturing concerns. By section 1, clause (g), it is proposed that the copyright secured by this bill shall include the exclusive right "to make, sell, distribute, or let for hire any device, contrivance, or appliance especially adapted in any manner whatsoever to reproduce to the ear the whole or any material part of any work published and copyrighted after this act shall have gone into effect, or by means of any such device or appliance publicly to reproduce to the ear the whole or any material part of such work."

This act would include in its scope all automatic musical instruments, such as graphophones, orchestrions, pianolas, music boxes, etc.

This is a very radical departure in legislation under the constitutional provision (art. 1, sec. 8) which conferred upon the Congress the power by legislation to protect authors in their "writings." It is proposed by this bill to extend the copyright provisions so as to include "any device, contrivance, or appliance especially adapted in any manner whatsoever to reproduce to the ear" the copyrighted composition.

1. This provision I believe to be clearly unconstitutional. The protection of "writings" has always been held to mean the making of copies of the book, print, photograph, etc.; that is, a copy which represents the composition to the eye. It is the graphic representation which is the proper subject of a constitutional copyright law. The constitutional provision goes no further. On the contrary, it is a part of the consideration to the public, that the purchaser or owner of a copy shall have the right to read it (if a book) as often as he likes, either to himself or aloud to others, or (if a musical composition) to repeat it or have it repeated as often as he likes.

If a person be rich enough to own a piano and skillful enough to play thereon, he can repeat a favorite theme ad infinitum; or he may memorize it and thus be independent of the copy. The automatic music players of the day are to the poor and

technically unskilled what the expensive musical instruments are to the rich and cultured. The proposed legislative departure is aimed at the former.

2. The bill proposes to invade the domain of the patent laws by covering mechanical devices, and thus to include what has been repeatedly held by the courts of England and this country can not by any stretch be included in the copyright provisions as they now stand. I desire, at an appropriate occasion, to submit an argument on this point. Will only observe here that the attempt to include a purely mechanical device, such as a sound-record cylinder, within the copyright provisions, has been made in various parts of the world. It has met with some success in France, causing great mischief, but in England, Germany, and Belgium has been disapproved by the courts. A decision of the court of appeals at Brussels, dated December 29, 1905, discussed the whole subject at length. I quote only the following:

"Considering that these apparatus can not be assimilated to the writing, or the notation by an engraving process, of the thoughts of the author; that they have nothing in common with the conventional signs permitting reading or comprehension of the work to which they are related; that isolated from the rest of the instrument they remain, in the actual state of human knowledge, without any utility; that they are only one organ of an instrument," etc.

3. Although the above quoted provision of the bill is doubtless aimed at the manufacture and sale of graphophone cylinders, automatic pianos, etc., it is broad enough to cover any and all musical instruments, since all these are devices adapted to reproduce to the ear copyrighted (as well as uncopyrighted) musical compositions. Under the proposed bill no one could play or sing publicly any copyrighted work, or make, even in private, a sound-record of a song or speech out of a copyrighted work. Every such act would be subject to a penalty of not less than \$10.

4. Not only are sound-record cylinders purely mechanical devices, being parts of operating machines, which take automatically the place of the fingers of a performer (and being for this reason not a proper subject of copyright provisions), but it is also to be noted that the value therein resides largely in the capability or reputation of the artists who sing or play in making the record, as well as in that of the manufacturers. We have here a case totally different from the making and selling of copies of a book or musical composition which is the proper subject of copyright protection under the Constitution, and in which the value resides entirely in the composition.

5. It is no hardship upon an author to have his composition repeated as widely as may be. Per contra, it is this repetition in the public ear that makes a song popular and extends the sale of copies of it. On the other hand, the repetition audibly of the musical sounds is the very purpose for which copies of the composition are bought; and clearly there is no difference in principle whether the audible repetition be by the fingers of a human being or by the mechanical fingers of an automatic player. In neither case are the fingers a proper subject of copyright.

6. I have been informed that this provision of the bill is being promoted by a private understanding between a certain concern and the publishers, with a view to fostering a new kind of monopoly and favoring certain special interests. On this head I can at present make no positive assertion, but can say that the bill would create opportunity for unfair competition, as the musical compositions are all controlled by a few music publishers, who are well organized to act together.

7. The bill is long and complicated, containing many provisions which should have close scrutiny. I will not weary you with a discussion of it. My present object is merely to say enough to make it plain that this legislation should be proceeded with very cautiously, and that the interests who would be adversely affected thereby should have ample time to study the bill carefully and to present their objections fully. It is very evident, even upon a hasty perusal of the bill, that its provisions have been framed for the benefit of a few individuals, and that the interests of the public have not been taken into consideration by its framers.

Very respectfully,

PHILIP MAURO.

#### STATEMENT OF EUGENE DE KLEIST, ESQ., OF NORTH TONAWANDA, N. Y.

Mr. DE KLEIST. My name is de Kleist. I represent the de Kleist Musical Instrument Manufacturing Company. I am established and have been engaged in the manufacture of automatic instruments for over thirty years. For the last fifteen years I have been a manu-

facturer in this country. I manufacture a great number of different automatic playing instruments, pianos, organs, etc. I also manufacture musical records which are used in connection with these instruments, and I am the only manufacturer of these records. I could not buy anywhere records that can be used in connection with the instruments I manufacture. Therefore you see, gentlemen, the passage of the bill before your committee would ruin my business.

The CHAIRMAN. How would that be accomplished?

Mr. DE KLEIST. Because I would be hindered from making the records. The moment the "arrangement" is made for the copies of the records that moment it becomes a copyright, and I can not go on and manufacture any music records which could be used in connection with my instruments. The records I manufacture are entirely different from those manufactured by others. I could not even buy records. And who would buy an instrument if he could not get the necessary means to play it?

Gentlemen, I am also an inventor. I do not know how many patents I own. I have long since forgotten the number. I have invested a very large amount of money. From fifty to one hundred thousand dollars would not cover the expenses that I have been put to in perfecting these inventions. What shall I do with these patents? I have all my property tied up in this business. The moment this bill becomes a law it is all lost to me. My life's work—there will be nothing left of it. And why? Only to favor a monopoly. That fact has been brought before you clearly. Gentlemen, I ask you for protection. I am entitled to it. Before coming to this country I investigated the laws of this country and found that the law protected me, and therefore I came here. I came here with the intention to improve my position in life, and now am I going to be ruined entirely?

Gentlemen, I want also to speak a few words on behalf of the workmen I employ. When I first came to this country I manufactured automatic organs, an entirely new industry in this country. Never before had automatic organs been manufactured in this country until I came here. I had great difficulty in finding workmen—workmen acquainted with the art. I had to educate every single man in my factory. These men used to live around the factory—farmer boys. Now what is to become of these people? I don't remember that ever a single one of my men has ever been found guilty of any crime or anything else. They have all their little homes. They have their families. Now, gentlemen, is it fair to drive them in the street? It will be very difficult for them to find employment in this country in that same business.

Gentlemen, that is all. I thank you.

Mr. HINSHAW. You don't object to the whole bill—only to certain parts?

Mr. DE KLEIST. Only to certain parts.

Mr. HINSHAW. To what parts do you object?

Mr. DE KLEIST. The sections B and G.

Gentlemen, I want to thank you very much for the time you have given me. I certainly appreciate the great patience you have shown in listening to our arguments.

Senator CLAPP. It may be our inability to understand your argument, but I don't think we yet see how this law will drive you out

of business. You can print and make everything after the law is passed that you can make to-day.

Mr. DE KLEIST. Certainly not. No; I can not.

Senator CLAPP. Why not?

Mr. DE KLEIST. Because the moment any arranger files two copies with the Register of Copyrights he is entitled to a copyright on such music.

Senator CLAPP. That will only apply in the future.

Mr. DE KLEIST. At this moment, no; but if it should become a law it would.

Senator CLAPP. So far as any musical compositions of to-day are concerned, you can go on with your business just the same?

Mr. DE KLEIST. To-day; yes.

Senator CLAPP. It does not interfere and will not interfere with any right you have to-day.

Mr. DE KLEIST. Not yet, but it would if this bill should become a law.

The CHAIRMAN. It only effects you in regard to compositions not yet produced.

Mr. POUND. Of course he could not do business unless he had all the late popular music.

Mr. HINSHAW. You can have the music if you buy the copyright of the owner.

Mr. DE KLEIST. Yes; but you will understand most of the principal composers have already made contracts with the Aeolian Company. Here is the contract made between the dealers and the manufacturers by the Aeolian Company, which says I must not buy records of anybody else.

Mr. CROMELIN. Mr. Chairman, after giving the matter much thought and consideration, and believing that it will be quite impossible for you to embody into your proposed copyright bill any clause covering reproductions to the ear from mechanical reproducers of sound, which can be put into practical operation; viewing the subject broadly from a business standpoint, without regard to the grave constitutional questions involved or the expediency or otherwise of your making this radical departure in legislation; having in mind the various instruments themselves and the impossible task of bringing them under one head, even if I admitted that they ought to be brought under the domain of copyright, which I do not—permit me to suggest that your best course, your safest course, and surely the course by which you will be doing the greatest good to the greatest number is to embody into your bill a provision somewhat similar to that adopted by the British Parliament in the copyright act of 1906.

I therefore petition you as the representative of my company, as president of the American Musical Copyright League, and in behalf of the American people to strike out paragraph g, section 1, and its dependent clauses, and, further, that you omit from the bill section 64 and substitute in lieu thereof the following:

SEC. 64. That in the interpretation and construction of this act the words "production," "reproduction," "work," or "writing" shall not be deemed to include perforated music rolls used for playing mechanical instruments, records used for the reproduction of sound waves, or other mechanical devices designed for the production or reproduction of sound, or the plates, molds, matrices, or other means by which such mechanical devices are made.

The CHAIRMAN. Are there any others to be heard?

The LIBRARIAN. No others have asked to be heard. I have some communications to offer. The Register, I believe, desired to ask a question of Judge Walker. He wished to ask it last evening, but I told him he had better defer it till this morning.

The REGISTER OF COPYRIGHTS. The question was in regard to the names of associations of composers in the United States.

Mr. WALKER. I have not the names and have never heard of any except the one mentioned in your paper. This list of participants in the compilation of this bill contains the names of parties who took part in the compilation of this bill, according to the statement of the Librarian of Congress, and there is here a list of people who participated, and among that list is one headed "Composers" and then a sub-head "Manuscript Society," and then appears the names of Miss Laura Sedgwick Collins and F. L. Sealy. And opposite Miss Collins's name is an Arabic numeral 1 and opposite the name of Sealy was the Arabic numeral 2; and a footnote indicates the persons were present only at the first session, of all the sessions held—Miss Collins was present at only the first session and Mr. Sealy was present only at the second session. So it appears no composers were even nominally present in the preparation of this bill, except these two. That is all the trace I have ever been able to find of any desire on the part of any composers to have this section amended, except so far as that desire was expressed by John Philip Sousa and Victor Herbert, and they are men of great wealth, and men upon whom the American people are loading money, and not content with the great wealth they are getting from the American people, which wealth has been largely augmented by the aid of the automatic instrument manufacturers, yet they are bent on ruining the business of these manufacturers, in order that they may amass still more wealth.

The LIBRARIAN. I do not understand from the Register it was with any view of questioning the statements of fact that the composers were not represented at the conference, beyond the very meager representation you have indicated, and that was not one iota more than you have stated, nor did he have any intention of minimizing your inferences from it. What was the reason of your question, Mr. Register?

The REGISTER OF COPYRIGHTS. The endeavor was to have invitations to the conferences sent to any association of composers, if they could be discovered, and our files show we sent out nineteen or more letters in the endeavor to ascertain whether such an association existed, and we were not able to get track of any except the one entitled "The Manuscript Society," which is really made up of composers of music.

The LIBRARIAN. Did you write the Musical Courier?

The REGISTER OF COPYRIGHTS. We wrote the Musical Courier.

*Example of letter of inquiry issued by Copyright Office as to associations of musical composers.*

MAY 1, 1905.

DEAR SIR: The pressure for some revision of the copyright laws has been constant of late years, so that finally the Senate Committee on Patents has promised to bring in a bill this coming session of Congress. In the meantime it has authorized the Librarian of Congress to call such conferences of the interests concerned in copyright

legislation as seem necessary in order to frame, if possible, a tentative bill for presentation to Congress.

It is desired to have a representation of all the producers of intellectual property, including music composers. In order not to have a larger number of delegates than can be managed it has seemed well to have delegations appointed by the different associations representing the interests involved, but we have failed so far to get track of any association of music composers as such. The Music Publishers' Association will be represented, and if we could have a delegate from some association of composers of music it would be well.

The Librarian suggested that I write you and ask whether you are interested or could aid us in this matter. If there is no association of composers of music would you kindly indicate how you think this class of producers could best be reached.

Sincerely, yours

THORVALD SOLBERG,  
*Register of Copyrights.*

GEORGE WHITEFIELD CHADWICK, Esq.,  
*Director New England Conservatory of Music,*  
*360 Marlborough street, Boston, Mass.*

THE NEW ENGLAND CONSERVATORY OF MUSIC,  
*Boston, Mass., May 6, 1905.*

Mr. THORVALD SOLBERG,  
*Register of Copyrights, Library of Congress, Washington, D. C.*

DEAR SIR: There is no association of musical composers in America that I am aware of, but I think if you write to Mr. William A. Fisher, of the Oliver Ditson Company, Boston, he can furnish you a list of the more important composers. I suspect, however, that the composers who will be perhaps the most interested are those whose compositions are published by M. Witmark & Co., of New York.

If you wish I can send you the names of all the Boston composers.

Yours, very truly,

G. W. CHADWICK, *Director.*

The CHAIRMAN. Have you any matters you wish to put in the record?

The LIBRARIAN. If I may ask Mr. Cromelin: Your Musical Copyright League has been recently organized—since the last hearing?

Mr. CROMELIN. Yes.

The LIBRARIAN. Do you know of any concerns making perforated rolls or sound records that existed prior to your organization, excepting mere jobbing associations? I mean an association such as would correspond, in that industry, to the association of book publishers, for instance?

Mr. CROMELIN. I know of none.

The LIBRARIAN. I ask, that because we made an endeavor to ascertain one.

I have some communications here.

The CHAIRMAN. That may go into the record.

ASSOCIATED ADVERTISING CLUBS OF AMERICA,  
SECRETARY'S OFFICE,  
*Kansas City, Mo., December 5, 1906.*

Mr. HERBERT PUTNAM,  
*Washington, D. C.*

DEAR SIR: At the convention of the Advertising Clubs of America, held in St. Louis, October 9 to 11, 1906, the convention adopted a resolution, copy of which I herewith inclose.

In order that you may see something of the work that the legislative committee in our organization will take up and something of what it desires to present at the conference referred to in the resolution, I inclose herewith a copy of the pamphlet printed under the auspices of that committee.

Any further information that you may request in regard to this matter I shall be pleased to furnish you upon request.

Very truly,

J. O. YOUNG,  
*Secretary.*

*Resolved*, That the Advertising Clubs of America realize that the proposed changes in the copyright law are of great importance to members of this organization, and that this organization therefore desires representation and hearing at any future conferences relating thereto, either before the committees of Congress having such matters in charge or elsewhere, and that a copy of this resolution be mailed to the Librarian of Congress by the secretary of the federation.

Furthermore, that a committee of five be appointed by the president to study the bill now pending before Congress and any others that may be submitted at the next session of Congress, and that said committee shall see to it that the interests of the advertising men of this federation be duly represented and presented before the committees of Congress before mentioned and at any other conferences that may be held relative to proposed changes in the copyright law.

WM. H. BABCOCK, No. 709 G STREET NORTHWEST,  
Washington, D. C., December 11, 1906.

DEAR MR. SOLBERG: As it is hardly practicable for me to attend the committee's session at this season, will you not kindly present my few and brief suggestions for me, by reading or having read to them this letter. You know that I am sometimes called on for opinions, counsel, and service in copyright matters; also that I have done a little publishing and am the author of a number of published books. I have had a varied and extensive experience of agreements with publishers. Consider me, please, as representing authors who have some market value at times, yet can not often dominate the market nor practically control the details of publication, notice, and supply of copies—that is to say, most authors.

After "deposited" line 4, section 11, insert "by the publishers of said work." Add at the end of said section "If the said work be a bound book, the omission of the publisher to deposit the said copies within the time stated shall be a misdemeanor punishable by a fine of twenty dollars; but the copyright shall not be affected thereby, if the author, on being duly notified of such omission, shall within thirty days after such notice supply the said copies."

On line 5 of the second paragraph of section 14 change the words "person claiming copyright" to "publisher or publishers of said book." Very often the author is the "person claiming copyright," but the publishers alone know just where the printing is done. My latest book was printed under contract with the publishers (I think) in Watertown, N. Y. But I can't swear that it wasn't shipped over the lake to Toronto. Why make a man swear when his information must be hearsay or nothing? If anyone must swear, let it be the man who knows.

Section 9. The first sentence should be changed to read somewhat like this:

"SEC. 9. That any person entitled thereto by this act may secure copyright for his work by registering the title thereof with the Register of Copyrights, as herein provided, such copyright being perfected by the publication of such work. The notice of copyright required by this act shall be affixed by the publisher or publishers of such work to each copy thereof published or offered for sale by the said publisher or publishers or under the authority or control thereof in the United States." The remainder of the present section to be retained, adding as follows: "In the case of a book the omission of such notice from any copy thereof shall be a misdemeanor on the part of the publisher or publishers punishable by a fine of not less than one hundred dollars, but such omission shall not in anywise affect the copyright, provided the author shall not have explicitly authorized such omission and, provided further, that any title to said copyright or any part thereof, legal or equitable, shall be the property of said author at the time of such omission or of such punishment."

You will remember a letter which I once showed you from a publisher, cynically announcing that he had destroyed the author's copyright by omitting notice from some copies and therefore that he should publish through the extended term without paying anything.

I don't need to characterize such an act or such a person. Many publishers are excellent men. Others are rascals. A third class will generally keep an agreement if it does not pinch them too sharply, but will strain every advantage the law and circumstances give them.

I would ask Congress, and especially the joint committee of gentlemen now considering the matter, to see fair play. I would remind them of the words of the Constitution on which the copyright law is based. I would point out that the law now in force practically puts the author at the mercy of the publisher, since the latter in several easy ways may, without even the knowledge of the author, destroy all the



latter's legal rights in the book. The law now proposed is obviously an improvement, but even it lays burdens on the author which ought not to be there, making him swear to matters which in his case must be conjectural, supply copies which may not be furnished him, and have the responsibility in some degree for the mere insertion of notices which are beyond his control. Indeed, he can not know whether they are always inserted or not unless by a persistent supervision which no one could practically undertake and which would not be tolerated.

I think the trouble arises from some confusion between the position of the author and the position of the publisher. A few books are published by the author. A few others are sold outright to the publisher. A few more are published under royalty for authors so popular and profitable that no publisher can afford to impose on them. But after deducting all these the great majority of cases still remain. In many of these the author retains the copyright by agreement, either because he insists on that, as I generally do, or because he pays all or a great part of the expenses of publication. In either case the publisher may have little interest in saving the copyright; he may even find an interest in surreptitiously destroying it, as in the instance cited. Beyond question many valuable works are thus jeopardized. This is the very reverse of encouragement to the author. There could not be a more shocking perversion of power constitutionally conferred. I hope the gentlemen of the committee will make the remedy thorough.

WM. H. BABCOCK.

BRITTON & GRAY,  
ATTORNEYS AND COUNSELORS AT LAW,  
GLOVER BUILDING, 1419 F STREET NW.,  
Washington, D. C., December 17, 1906.

HON. HERBERT PUTNAM, LIBRARIAN OF CONGRESS,  
Washington, D. C.

MY DEAR MR. PUTNAM: Almost immediately following my conversation with you over the phone, I received from Mr. Falk the inclosed protest in reply to the newspaper protest. Will you kindly see that it is printed with the record.

Yours, very truly,

BRITTON & GRAY.

NEW YORK, December 15, 1906.

To the Joint Senate and House Committee on Patents, Washington, D. C.:

The Photographers' Copyright League of America have had two delegates in attendance at every hearing given by you on the proposed bill, in order to explain any question that might arise as to the bill in its present form as it provides for photography.

Only by accident have we learned that a written objection was filed by the American Newspaper Publishers' Association at the very close of the final hearing. We are in ignorance of the text of this memorandum except as intimated in a newspaper report.

In view of the fact that four representatives of the American Newspaper Publishers' Association attended the conferences, and that the objections now presented were formulated and recommended by their copyright committee as far back as February 20, 1906, at the twentieth annual convention of the American Newspaper Publishers' Association, held in New York City, we protest that it is unfair to have delayed the presentation of the aforesaid objections until the moment of the adjournment of the hearings, when no rejoinder could be made.

The objection to the proposed form of "notice"—that "it seems to reduce the requirements of warning as to the fact of copyright"—is not substantiated by the text of the bill (see section 14), which provides for the word "Copyright," or the abbreviation "Copr.," "or the letter C inclosed in a circle thus: ©," accompanied in every case by the name of the author or copyright proprietor as registered in the Copyright Office," which gives exactly the same warning as in the present law. (The symbols "Copr." and "©," accompanied in every case by the name of the author or copyright proprietor, are surely as lucid and protective as the symbols required in the trade-mark act (February 20, 1905)—"Reg. U. S. Pat. Off.," which are acknowledged to answer every purpose of warning.

The elimination of the date from the "notice" is to-day a part of the practice of the average high-class newspaper which frequently fails to print it (except in the case of the date being that of the current year, and often even then) in spite of the require-

ment to do so necessitated by the present law, contained in their license to reproduce, on the plea that a back-date takes away from the news value. This occurs in thousands of cases every year and is so evidently in accord with the desire and practice of the newspaper world that it is probably not included in their objection.

The criticism that the new bill is more severe in its application to infringements than the existing law is correct only in part. The assessment of \$1 per infringing copy and the maximum of \$5,000 are not changed from the present law.

The new bill, however, does away with the anomaly of the present law by the wording of which the penalty applies only to copies "found in possession." It has often happened that a willful infringer who had sold and issued all the infringing copies before the infringement could be discovered and who had *made a profit out of the sales and accomplished the most injury*, could not be punished, whereas a perhaps unintentional infringer, who had not issued his infringements, could be punished because the copies could still be "found" in his "possession."

The contention that "newspaper reprints of photographs are not such reproductions as can be substituted in sales for the originals" is misleading and calculated to divert attention from the vital point.

Many photographs are copyrighted *to protect the privacy of the individual portrayed*, and to give any publisher the right to reproduce such portraits without license would destroy privacy.

The essence of copyright is the control of the thing copyrighted, and a photograph when copyrighted should be controlled by the owner of the copyright, as in every other class of copyright property. As to the benefit or harm accruing from its reproduction, it is for the owner to judge.

We submit that either a copyright belongs to its owner or it is not a copyright at all.

Respectfully, yours,

B. J. FALK,  
PIRIE MACDONALD,

*Delegates of the Photographers' Copyright League of America.*

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NATHAN BURKAN,  
ATTORNEY AND COUNSELOR AT LAW,  
99 Nassau street, New York, December 15, 1906.

DEAR MR. SOLBERG: I herewith inclose remarks made before committee with corrections. In my haste to finish in the time allotted me I made a number of errors, which I desire to correct. Thanking you in advance.

Sincerely, yours,

N. BURKAN.

I also inclose substitute for section (g).

*Substitute submitted by Nathan Burkan.*

Sec. 1 (g). To make any record of any copyrighted musical or literary work or any part thereof, after this act shall have gone into effect, in any system of notation, perforations, protuberances, depressions, impressions, or in any other system, manner or method whatsoever, used for reproduction to the ear by mechanical instruments or devices; to make any sound record of the same or any part thereof adapted to reproduce or cause any mechanical instrument to reproduce to the ear the sounds forming or identifying the same; to use, embody, or represent the same or any part thereof in any manner whatever, in any device adapted to reproduce or to cause any mechanical instrument to reproduce to the ear the same or any part thereof.

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COMMITTEE ON RIVERS AND HARBORS,  
HOUSE OF REPRESENTATIVES UNITED STATES,  
Washington, D. C., December 7, 1906.

HON. HERBERT PUTNAM, LIBRARIAN, LIBRARY OF CONGRESS,  
Washington, D. C.

MY DEAR SIR: I have a letter from the Cleveland Directory Company strongly favoring the pending copyright bill. The president of this company maintains that under present conditions irresponsible persons may copy their work, which has cost

months of labor and thousands of dollars to complete. He strongly favors the misdemeanor section. I should be glad if these sections should receive careful attention in the framing of any bill which may be recommended. I shall be glad to confer with you in regard to the measure if any assistance is required.

Yours, very respectfully,

T. E. BURTON.

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CYRUS KEHR, COUNSELLOR AT LAW,  
605 EMPIRE BUILDING, KNOXVILLE, TENN.,  
Knoxville, Tenn., December 6, 1906.

HON. THORVALD SOLBERG, *Register of Copyrights,*  
*Library of Congress, Washington, D. C.*

SIR: Your circular and accompanying copy of digest of suggestions and criticisms relating to the pending copyright bill (S. 6330; H. R. 19853) came during my absence.

I am correctly quoted regarding section 25, paragraph 2. The suggestion which I make I know from practical experience to be important. In a case of infringement of an art photograph the infringer made photographic copies including the lawful publisher's copyright mark, the whole being done so accurately that it was extremely difficult to ascertain that the copies under consideration were in fact spurious. In this way a skillful infringer can carry on his piracy a long time without being discovered, and even after the discovery is made it may be difficult to prove to a jury or court that the spurious copies were not put out by the lawful publisher. I regard this as the most contemptible form of copyright piracy. It is akin to counterfeiting and forgery. I take leave to suggest the insertion of the following paragraph immediately after the first paragraph of section 25:

"Any person who, with fraudulent intent, shall insert or impress or apply into, to, or upon any article which is an infringement of any copyright secured by this or any other act of Congress, the notice of copyright inserted or impressed or applied into, to, or upon an article published or made by a lawful publisher or maker under said copyright, or who shall wilfully or knowingly aid or abet in so inserting or impressing or applying such notice to such infringing article or who shall wilfully or knowingly import such an infringing article bearing such copyright notice, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment for not exceeding one year or by fine of not less than two hundred dollars nor more than one thousand dollars, or both, in the discretion of the court, such punishment being independent of the punishment provided by the last preceding paragraph of this section."

In section 25, line 2, are the words "any copyright secured by this act." Why limit to this act? This remedy should apply to acts now in force. Why not use "any copyright secured by this or any other act of Congress?"

The same applies to line 2 of the second paragraph of section 25.

In section 25, second paragraph, line 3, are the words: "upon any article." Is this paragraph intended to apply this penalty for every article or collectively to a group or lot of articles made at one time?

Very respectfully,

CYRUS KEHR.

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CYRUS KEHR, COUNSELLOR AT LAW,  
605 EMPIRE BUILDING,  
Knoxville, Tenn., December 6, 1906.

HON. THORVALD SOLBERG,  
*Register of Copyrights, Library of Congress, Washington, D. C.*

SIR: In copyright bill (S. 6330; H. R. 19853), I take leave to suggest the addition to section 23—perhaps to follow paragraph (d)—a provision providing that it shall be a misdemeanor punishable by fine or imprisonment, or both, for an infringer, or his agents or employees, to destroy, secrete, or remove infringing copies after the marshal enters upon the premises with a writ of seizure or other writ for the seizing or taking of such copies.

I make this suggestion because of actual cases of such removal or secretion. Recently there was a case in which about 5,000 infringing copies were thrown down the back stairway after the marshal had entered the premises.

Very respectfully,

CYRUS KEHR

[Postal Telegraph Commercial Cables Telegram.]

NEW YORK, December 10, 1906.

LIBRARIAN OF CONGRESS, *Washington. D. C.*:

Should new music supply be at all limited, the business of manufacturers and dealers in mechanical musical rolls, cylinders, disks, etc., in which millions are invested, would be ruined. The public demand constant supply of new, up-to-date selections.

LEEDS &amp; CATTLIN Co.

TREASURY DEPARTMENT, OFFICE OF THE SECRETARY,  
*Washington, December 14, 1906.*

Mr. HERBERT PUTNAM, *Librarian of Congress.*

DEAR MR. PUTNAM: I inclose a copy of a letter addressed to the chairman of the Senate and House Committees on Patents with a proposed amendment to the copyright bill. This is done in accordance with a request of the joint committee.

It will be noticed that in my letter I have referred to section 22 of the bill. I regret that I did not discover this apparent defect at an earlier date, and my excuse is that I was particularly interested in sections 16, 17, and 26 to 31, inclusive, of the bill. Moreover, I was under the impression that Mr. Stewart of the Bar Association and Mr. Hughes of the Department of Justice, the latter being responsible for the insertion of the postal statutes, were looking after that particular provision.

I am very desirous of having the sections relating to our branch of the work made perfectly clear, and for that reason I bring the matter up at this late date.

I wish to again thank you for your courtesy and kind consideration during the various conferences.

Very truly,

CHAS. P. MONTGOMERY.

TREASURY DEPARTMENT, OFFICE OF THE SECRETARY,  
*Washington, December 14, 1906.*

Mr. HERBERT PUTNAM, *Librarian of Congress.*

SIR: As requested by the joint committee, I have the honor to inclose herewith the proposed amendment to Senate bill 6330 (H. R. 19853).

As stated to the committee, the necessity exists for this amendment by reason of the fact that customs officers and postmasters are unable to examine the large number of catalogues of title entries to determine whether a given importation is prohibited, without causing delay in the delivery of importations, complaint, and probable injustice.

The clause "or injured parties" is used advisedly, as I understand copyright proprietors not infrequently assign their rights to reproduce by methods other than that used in the production of the copyrighted article, with the understanding that the original copyright notice is to be placed upon all such reproductions. The injured party in such a case would not be the copyright proprietor but his assignee.

It is believed that if this proposed amendment is adopted, it will enable the Treasury and Post-Office Departments to make such regulations as will be decidedly beneficial to copyright proprietors.

Mr. Currier asked me whether it would not be beneficial if the statutory notice of copyright were imprinted on foreign manufactured articles. I replied that it would, but the fact must not be lost sight of that a person who designs to evade the copyright law will not imprint such notices upon the articles which he may send into this country. Naturally, the efforts of such a person would be to eliminate any and everything which might tend to bring to the notice of customs officers that the article was prohibited.

With regard to section 22, permit me to suggest that the provisions therein applying sections 3893 and 3895 of the Revised Statutes appear to be vague and indefinite, and I can not perceive their proper application in this connection. Moreover, section 3893 was amended July 12, 1876, and September 26, 1888. If it was intended by the insertion of these two statutes to prohibit the use of the domestic mails for the transmission of fraudulent copyright reproductions, then it seems to me that it would be proper to place in the bill a separate section embodying that idea. If this were done, section 22 would read: "That any reproduction, without the consent of the author or copyright proprietor of any work or any material part of any work in

which copyright is subsisting shall be illegal and is hereby prohibited; and the importation into the United States of any such fraudulent copies or reproductions is hereby prohibited." The language of the section would then be clear.

There appears to be no need for a provision prohibiting the exchange in the mails between the United States and foreign countries of fraudulent copies or reproductions of copyrighted articles, for the reason that the various postal conventions prohibit the exchange of such articles, and, moreover, section 29 of the bill under consideration authorizes the detention and seizure, if necessary, of such articles.

Attention is invited to section 64, which makes section 4966 of the Revised Statutes a part of the act. Section 4966 was amended January 6, 1897. (29 Stat. L., 481.)

Respectfully,

CHAS. P. MONTGOMERY.

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TREASURY DEPARTMENT, OFFICE OF THE SECRETARY,  
Washington.

PROPOSED AMENDMENT.

SEC. 29½. The Secretary of the Treasury and the Postmaster-General are hereby empowered to make necessary and proper rules and regulations requiring notice to be given to the Treasury Department or Post-Office Department, as the case may be, by copyright proprietors or injured parties of the actual or contemplated importation of articles prohibited importation by this act and which infringe the rights of such copyright proprietors or injured parties.

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4815 TRINITY PLACE,  
Philadelphia, December 8, 1906.

HON. THORVALD SOLBERG,  
*Register of Copyrights, Washington, D. C.*

MY DEAR SIR: I see by the paper that the proposed amendments to the copyright bill are again being argued upon. I had no idea that another hearing was to take place so soon, but I trust there may yet be time to place the following paragraphs before the Committees on Patents, as I feel most strongly the injustice of our present laws, although I regret troubling you in the matter at this late date. If these few sentences can be presented without eliminations I will appreciate it, as I have condensed as much as seemed possible.

Section 1 (f). The right to publicly perform ordinary musical compositions, waltzes, songs, marches, etc., should not be restricted; but in the case of musical-dramatic or large religious or concert works (consisting, say, of more than two numbers) the holders of copyright should have full protection against public performances without their permission.

Section 1 (g): By what right the opponents of this measure seek to allow the manufacture and sale of copyrighted musical compositions, in whatever form, by any persons other than the holders of such copyright, it is difficult for any fair-minded person to conceive. Is it not the intent of the law that an inventor shall be protected as fully as possible against the theft of his invention whether it be a machine, a medical formula, or a piece of music? That the fact of a musical composition being published and offered for sale in the usual printed form should give to anyone the right to make and sell numberless copies of that composition simply because such copies differ in form or mechanical construction is absurd. According to this theory any person should have the right of duplicating the full name and ingredients of any patent medicine on the market and selling it broadcast throughout the land if he but used a different style of bottle from that of the owners of the patent. Therefore I most earnestly urge the passage of such laws or the adoption of such amendments as will effectually correct this wrong.

With thanks for your kind attention, I am, respectfully, yours,

S. HAROLD SARGENT.

UNDERWOOD & UNDERWOOD, STEREOSCOPIC PHOTOGRAPHS,  
3-5 West Nineteenth Street, New York, December 16, 1906.

Subject: In re hearings on proposed copyright legislation.

From press reports and advice of a delegate present at the closing public hearings, we understand representations are expected to be presented on Monday asking provisions in the pending bill which, if as reported, would seriously affect existing interests of proprietors and makers of photographs.

We are advised of certain points these representations are expected to cover. We appreciate the forecast may not be accurate, but beg to submit and ask consideration of facts bearing on such points as apparently our only practicable method of defense against what, if successfully made as suggested, would be a most serious and vital attack on our existing, and we certainly feel our future, legitimate interests.

Such points and our reasons for deeming them unjustified are:

We understand it may be claimed—

1. That injustice is done by giving the "mechanical maker of a kodak snapshot" the same protection that is given to the author of a literary, artistic, or musical composition.

We deem the expression "mechanical maker of a kodak snapshot" unfair to the photographic interests now in much the largest degree taking advantage of copyright protection. We know of no way to furnish accurate statistics, but comparing the number of photographic entries made by ourselves and by similar concerns with the total number of photographs entered, we are confident the number entered by "amateurs" is exceedingly small compared with the entries by "professional" photographers. (We use the words "amateur" and "professional" as used in Treasury Decisions affecting importations of exposed "films," "dry plates," etc.)

Effective professional photography, as nowadays actually practiced, requires the same extended training, experience, judgment, and individuality required in any other method of properly interpreting and recording conditions, events, scenes, etc., the same exposure to danger and hardship as required in the war correspondent, the explorer, or the scientific investigator, and the same discretion in selection of material. The educational value of the results of such photographers' efforts is universally recognized and attested. The expense of securing such results is as great as in any manner of gathering together facts and records.

It seems no injustice to require anyone wishing to use such results for profit to pay, as they now do, a legitimate price for their use.

2. That injustice is done by treating the reproduction in a newspaper of a copyrighted photograph as causing every copy of the offending issue to become \* \* \* subject to a penalty of \$1 for every such copy and to other punishment.

The appropriation of another's property, of whatsoever nature, willfully and for profit, should certainly not plead justification. We feel making appropriation of property in a copyright (when in circumstances and motive it is a theft) a misdemeanor, no greater hardship than making the theft of the photograph itself such crime.

As to amount of damages—the discretion allowed the court in section 23 b of the published draft seems to us an ample guaranty against injustice. Whether such discretion should be greater or less would appear to us not to affect the principle. It does seem to us, however, the penalty to which the private party attempting to appropriate public property by false notice, as in section 25, is subjected (an eminently just and reasonable penalty) should be in no event greater than the provision for the protection of the legitimate property of the private individual against infringement.

3. That injustice is done \* \* \* "by failing to recognize that newspaper reprints of photographs are not such reproductions as can be substituted in sales for the originals, and that instead of inflicting injury by reducing sales they often tend to advertise and to increase the sales of the original photographs."

It seems to us but reasonable that the owner of a photographic negative should be permitted to reproduce therefrom in any such form as he may deem expedient, and his property therein be protected in one form as well as in another, even though it be in exactly such form as it would appear in a magazine or newspaper.

No hardship now falls on periodical or other publishers wishing to use a copyrighted photograph except payment for its use. This is now a source of profit to makers of photographs, and it certainly appears as legitimate to expect payment for production of the photograph reproduced as for the written article or report reproduced.

An important proportion of photographs copyrighted are used for no other purpose than reproduction in magazines or newspapers and are published in no other

form. From our own records we get results as below. Copyright entry in each case was made expressly for use in the class designated. A few in each class will eventually be used in the other, but the percentage is small and final result is very closely indicated in the statement.

The photographs entered by us for copyright during the past five months and the purpose of such entry are:

	Total photo- graphs entered.	For use in maga- zines or newspa- pers.	For all other uses.
1906.			
July .....	44	29	15
August .....	56	41	15
September .....	39	39	.....
October .....	97	79	18
November .....	233	60	173
	469	248	221

As to the value of the "advertisement," our own experience, and considering what would logically be the policy of all conservatively-managed publications is that no form of credit or acknowledgement which would in any way be an advertisement can be secured except when the owner of the photograph is in position to secure it as a consideration. This is logical and reasonable, and is our experience.

Very respectfully submitted,

UNDERWOOD & UNDERWOOD.

To the JOINT COMMITTEE ON PATENTS  
OF THE SENATE AND HOUSE OF REPRESENTATIVES,

Washington, D. C.

(In care of Librarian of Congress.)

The LIBRARIAN. Mr. Livingstone desires to submit for the record a memorandum which reemphasizes certain points he has touched upon, but stated they would like to treat them in a written memorandum.

The CHAIRMAN. That may go into the record. (See page 110.)

The LIBRARIAN. Mr. Tindale submits this as a written statement covering some remarks he made at the hearing. He is not here. I do not know what part of the record it refers to; he simply left it with me. He may not have given it to the stenographer at the time.

Mr. CHANEY. In respect to matters of that sort, since these people have not had an opportunity to be heard, would it not be well to allow them to submit what they have to say in writing and let it go into the record?

The LIBRARIAN. I assumed that I should perhaps have had a telegram from them by this morning indicating any such request, but no doubt if we receive such communications they may go into the record.

Senator CLAPP. Would it not be well to authorize them to be incorporated into the record?

The CHAIRMAN. Yes, that is understood. Are there others to be heard from?

Mr. CROMELIN. I submit if this bill is passed it would have a very damaging effect upon the mechanical-instrument manufacturers; even the tying up of a small proportion of music, new or old, would have a bad effect.

I understand the Teleelectric Company are about to put upon the market a new form of electric piano player by which the personal interpretation of the performer can be obtained. If the Æolian con-

tracts are enforced this company will practically be put out of business. And I think it so important that it should be brought to the attention of the committee and have it spread upon the record.

I have an important telegram from the Teleelectric Company, of Pittsfield, Mass., which reached me to-day and possibly should go in the record:

DECEMBER 10, 1906.

PAUL H. CROMELIN,  
*Care Librarian of Congress, Washington, D. C.:*

The tying up of even a small proportion of music, new or old, would have a very damaging effect on the industry. Customers will insist on freedom to select at will and will go where they can get it. Conditions are not the same as with sheet music. That is universally available, and one publisher does not refuse to sell copyright music to a customer who purchases other music elsewhere, even though the trust should agree to sell music rolls. This company would not be benefited, as it can only use its own cuttings.

THE TELEELECTRIC CO.

THE CHAIRMAN. Have you any suggestion you desire to make, Mr. Putnam?

THE LIBRARIAN. I am not advised of any further requests for hearing. I will, then, with your permission, say a few words bringing the history of the bill to date.

At the hearing in June I brought its history in a summary way to the date of its introduction, May 31. The date of its introduction was the date of its first publication. Prior to that time it had not been put before the public as a bill. Specific requests for it were not answered from the copyright office with any draft we had in hand, so that until May 31 the bill was not before the public. If some of the earlier drafts under consideration were seen by any persons not members of the conference, it was not through any action of the copyright office, because the copyright office had pledged the participants, as of course, not to put the bill out before the public while changes were still being considered in conference. (Strictly speaking, therefore), the bill introduced on May 31 was not in existence on May 23.

It was not, then, until the date of the introduction of the bill that it can be said to have been published. I speak of this in order to emphasize the fact that the criticisms which will be useful to the committee will be those submitted after publication of the bill by its introduction.

The notices of the hearings of June 6 to 9 were sent to all persons (86) who had attended the copyright conferences; to a list of persons handed to us by the chairman of the House Committee on Patents representing requests for notice received by him (there were 17 of these), and to a list, in addition, of librarians—a special list—also from him. There were 20 of these. The circular was sent to some 50 to 75 other individuals also who, it was thought, might be interested in the hearings, if we might judge from communications that had reached us. The circulars which announced the present hearings were sent out to those addressed in June and to some others—about 40—in addition; also to the secretaries of the several "copyright leagues." Moreover, circular notices were sent out with copies of the bill wherever requested, up to 300 in all.

On November 22 we sent to the Associated Press a request to publish notices of the present hearing.



Our request read as follows:

WASHINGTON, D. C., November 22, 1906.

SIRS: The chairmen of the Committees on Patents of the Senate and House of Representatives have requested this office to announce that hearings upon the pending copyright bill will be resumed on December 7 and 8, 1906.

Like those in June last, they will be by the two committees, sitting conjointly, in the Senate reading room at the Library of Congress. They will presumably begin at 10.30 a. m.

As a large number of persons are likely to be interested, we trust that you will be able to give the widest publicity possible to this announcement.

THORVALD SOLBERG,  
*Register of Copyrights.*

The ASSOCIATED PRESS,  
*Evening Star Building, Washington, D. C.*

As published in certain papers, the notice named the committees as Committees on "Library" instead of Committees on Patents.

After the June hearings the office suggested to the chairmen of the two committees that under its duty to gather criticism and digest it, to get it into form for presentation to the committee and for its convenience, it would be desirable to have some published request from the committee that such criticism should be forwarded to the copyright office. Accordingly there was such a notice published in the following form. I don't seem to have it here at the moment. Yes, sir; it is here. It is as follows:

JUNE 20, 1906.

"With reference to the status and prospects of the pending copyright bill the Librarian of Congress has issued the following statement:

"The hearings by the two Committees on Patents, sitting as a joint committee, which were begun on June 6 and concluded on June 9, were preliminary merely. The chairman of the House committee announced that his committee would be prepared to resume hearings after the first Monday in December. The Senate committee has authority to sit during the recess, but the chairman indicates that there is no possibility of any hearings during the summer, and no probability of hearings prior to the beginning of the next session. The Senate committee has passed the following resolution which it has instructed me to communicate as widely as possible to the public:

"Pending further hearings upon the bill (S. 6330, H. R. 19854) the register of copyrights is requested to keep record of the discussion of its provisions, and to receive, in behalf of the committee as well as of the Copyright Office, suggestions for its amendment whether in form or substance, and to digest these, also, for convenient consideration by the committee."

I desire to have that put in the record, Mr. Chairman.

The CHAIRMAN. There are no objections.

The LIBRARIAN. Our request to the Associated Press in the case of that notice, as in the case of the recent one, was that it should be given as wide publicity as possible.

Now, sir, all the letters, or rather communications, that have come to us since the June hearing were transcribed in duplicate, and a copy has gone to the chairman of the Senate committee and another copy to the chairman of the House committee. The originals are here, of course, for the committee's inspection if necessary. That transcript was brought down to last Monday.

The office has attempted, as at the outset I indicated, to tabulate the suggestions and criticisms received to date or otherwise noted, as well as to set forth against each particular section of the bill each amendment proposed. That attempt has been embodied in print in the form in which you have it, with addenda, and a supplementary addendum, which includes the variant provisions proposed by the substitute bill of Mr. Burton. Those criticisms also are thus avail-

able, and the others will be made so, which are to be recorded in these present hearings.

What is not available for convenient aid in your consideration of the bill (I mean what has not been introduced to your particular attention) is the accumulated matter prior to May 31. At the hearings of June I did call your attention to the records of the conferences, in four volumes, and the sixteen volumes of correspondence and other communications relating to those conferences and to the bill. Of course these volumes are entirely accessible to the committee, but they were not introduced to your attention in any other way, and the bill was presented to you simply as a bill. But they are available if you have occasion to examine them at any time, or to consider them in the consideration of any particular question which you have occasion to look into, such as the discussion which preceded the adoption of a provision as set forth in the bill.

There is not yet available one body of suggestions that might be of considerable value to you; that is the comment and criticism of the newly, recently constituted committee of the American Bar Association. The original committee consisted of only three members—Mr. Arthur Steuart, of Baltimore; Mr. Edmund Wetmore, of New York, and Mr. Frank F. Reed, of Chicago. That committee reported to the bar association at its recent annual meeting last summer and, as I recall, asked to be discharged. [Note by Mr. Putnam: "An error; the committee was continued and enlarged."] A new committee was appointed, however, to continue, on behalf of the bar association, consideration of the pending bill and to report later. Of that committee, also, Mr. Steuart is chairman. The [other members are Edward S. Rogers, of Chicago; Edmund Wetmore, of New York; Henry E. Randall, of St. Paul; Robert H. Parkinson, of Chicago; Antonio Knauth, of New York; William L. Putnam, of Boston; Frank P. Prichard, of Philadelphia, and A. Caperton Braxton of Richmond. Mr. Steuart informs me that he has not yet had an opportunity to have a meeting of that committee to consider the bill and submit to you its criticisms and suggestions as a committee. He wrote to each member of the committee, sending a copy of the bill and asking for offhand suggestions. He had hoped that the replies might be useful to you and had sent me copies of some of them. But he now writes me as follows:

In response to your request I desire to say that the printed copies of letters which I sent you a few days ago from the members of the copyright committee of the American Bar Association have been written by the members of the committee merely as a means of exchanging ideas between the members of the committee and to promote the thought and study of the members of the committee, so that they might know what each other was thinking about.

I have sent you these copies in order that you might be advised of what we are doing. After the careful and elaborate analysis of the criticisms of many persons upon the copyright bill, which have been made by your office and printed by you, was examined, and after hearing the arguments which have been presented to the committees of Congress which have the copyright bill under consideration, I have become convinced that the expressions of opinion made by the various members of my committee who have written letters to me are very immature and not sufficiently considered to justify submitting them to the members of the patent committees. I will at the earliest possible moment, however, urge upon the members of my committee to give to the subject as careful attention as they possibly can give, and we will then have a meeting, if possible, in Washington, at which meeting I shall be very glad to have you present, and formulate for the committee a single letter which we will be glad to submit to the patent committees.

As I recall it superficially the criticism, for the most part, is concentrated about a few provisions of the bill, particularly section 1 (b) and some others affecting "the nature and extent" of the right, the formalities requisite to secure it, the remedies and jurisdiction, and the clauses relating to importation. Something was offered as to term, but rather from the personal standpoint; and the copyright office feels that from the scientific standpoint the record might be more complete. We have printed off on this card the terms of copyright in the various countries of the world, arranged in the order of length, running from minimum to maximum. This form is for the convenience of the committee.

The CHAIRMAN. Yes, sir, we have seen that.

Mr. MCGAVIN. Do you intend to insert that in the record?

The LIBRARIAN. Yes, sir.

The CHAIRMAN. We have no objection.

The LIBRARIAN. In answer to criticisms as to phraseology and other matters as to which the advisory committees of the bar associations might particularly be called upon to speak, you have had Mr. Steuart's own testimony here. You have not yet heard from Mr. Fuller, who is chairman of the advisory committee—the committee of the New York Bar Association. But as I indicated at a former session, Mr. Fuller is writing out his statement and it was your approval that it should go into the record.

Now, there are provisions in the bill as to which the copyright office offers, and will offer no opinion. The register may have an opinion; I may have one; but the office as such will offer none. But there are other provisions in the bill as to which the office as such must have an opinion—an official opinion. Especially will this be the case as to three of the questions dealt with in the bill: The formalities, the term, and its own administration.

Upon the question of the formalities—what shall be necessary in order to secure copyright—the office can not but have an opinion, and of course if asked will express it. Upon the question of term the office can not avoid having an official opinion and expressing it. (Of course I do not mean to express it at this point. I am only indicating that it must exist.) And the third matter as to which the copyright office must have an opinion, because it is itself directly concerned, is the administrative section of the bill, which covers the administration of the office. So far as I recall there has been no particular criticism of that section except as to three provisions. The first is the provision that the register shall have authority to make rules and regulations, section 52:

That subject to the approval of the Librarian of Congress, the register of copyrights shall be authorized to make reasonable rules and regulations not inconsistent with the provisions of this act, for the conduct of proceedings with reference to the registration of claims to copyright as provided by this act: *Provided*, That no breach of such rules and regulations shall affect the validity of the copyright.

That provision has been criticised as vesting a quasi-judicial authority in the register and though the criticisms have not reached you I think they will be formulated and reach you.

Another criticism is as to the fee. The increase in the fee has been criticised.

The third is directed to the provision which authorizes the destruction of card indexes, from time to time, as the matter of those indexes in the office is reproduced in printed publications of the office.

Those are the three criticisms that so far as I recall particularly touch the section of the bill which refers to the administration of the copyright office. The last one was your suggestion, Mr. Low, I believe.

Mr. Low. It appears to me that card indexes are very valuable, and much easier to consult than the printed volumes successively printed, and that they should be preserved in any way possible.

The LIBRARIAN. That is the opinion of the copyright office; that so long as the card indexes did not become unwieldy they should be preserved. We recognize that in the library proper, where we maintain our catalogue in the card form and extend it indefinitely. On the other hand, the card indexes of the copyright may become so distended that it will not be practicable there, in connection with other administrative work, to justify the retention of them when the matter of them has appeared in available printed form. The provision, however, only authorizes destruction. It does not require it.

Mr. Low. I would suggest that they might be destroyed at any time when the whole body of matter contained in the index which is destroyed appears in one printed index. It is very difficult and takes a lot of time to go through successive volumes—that is to say, to analyze the printed indexes.

The LIBRARIAN. I think our ideas of what would be convenient and what would be safe would entirely coincide with yours; and I mentioned that as only one of the three details of criticism that had affected the provisions relating to the administration of the office.

I think it would be of concern to those who have addressed you, Mr. Chairman, to know whether they would be able to get at the record before it is printed. You intimated at the hearings in June that they might look at their remarks before they went into print. Am I permitted to say that now?

The CHAIRMAN. That is understood.

The LIBRARIAN. And the hearings are to be printed, I suppose?

The CHAIRMAN. As soon as possible.

The LIBRARIAN. And the office will be glad to attend to the indexing of them, as it did for the Senate print in June.

I have nothing more, Mr. Chairman, which I feel now under obligation to submit.

The CHAIRMAN. As I understand, this concludes the public hearing and the matter is adjourned.



## APPENDIX.

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### GENERAL TERM OF COPYRIGHT IN VARIOUS COUNTRIES.

1. Fifteen years from publication: Greece.
2. Forty-two years from registration, in two terms of twenty-eight years and fourteen years: United States, Canada, Newfoundland (copied from the United States legislation).
3. Forty-two years from publication, or life of author and seven years: *See* No. 7 below.
4. Fifty years from publication: Brazil, The Netherlands.
5. Life of author, or at least forty years after publication: Italy (with a second period of forty years' enjoyment of royalty of 5 per cent on publication price), Turkey.
6. Life of author and five years: Cape of Good Hope (or thirty years from publication), Chile (with possible special extension to ten years).
7. Life of author and seven years after his death, or forty-two years from publication, whichever is longer: Great Britain—Australia, India, Natal, New South Wales, New Zealand, South Australia, Victoria, Western Australia—also Siam.  
[The English copyright commission of 1878 recommend a term of life of author and thirty years, and that has been the term proposed in subsequent English copyright bills.]
8. Life of author and ten years after his death: Roumania.
9. Life of author and twenty years after his death: Peru, Haiti (life of author, and life of his widow, their children for twenty years, or, if no children, heirs or assigns for ten years).
10. Life of author and twenty-five years after his death: Salvador.
11. Life of author and thirty years after his death: Austria, Germany, Japan, Switzerland.  
[This term of life of author and thirty years was recommended by the English copyright commission of 1878, and has been the term proposed in subsequent English copyright bills.]
12. Life of author and fifty years after his death: Belgium, Bolivia, Costa Rica, Denmark, Ecuador, Finland, France, Hungary, Luxembourg, Monaco, Norway, Portugal, Russia, Sweden, Tunis.
13. Life of author and eighty years after his death: Colombia, Spain.
14. Perpetual copyright: Guatemala, Mexico, Venezuela, and (?) Egypt.

## AMENDMENTS TO COPYRIGHT BILL.

[Approved by American Copyright League or acceptable as in line with its action.]

Section 1 (a), or any material part thereof.

(b), to sell, distribute, exhibit, or let for hire any copy of such work;

(f), to publicly perform for profit . . . [and add] or form of record; [in which case cancel clause (g)].

Section 6. [Add] or to secure or extend copyright in such original works.

Section 8 (a), [Omit] making and.

Section 13, from plates made within the United States from type set therein.

Section 14, last paragraph, in a composite work or periodical.

Section 18 (b), by a corporate body otherwise than as assignee of the individual author or authors.

(c), but not including any work specified in sub-sections (a) or (b) hereof, except that the copyright as a whole of a composite work or periodical shall not preclude the right of an individual author of any separable copyrightable component part thereof to obtain separate copyright for his individual work for the term of life and fifty years;

(Last paragraph). [Add] provided, that within fifty years from the date of publication and before the death of the author his true name shall be registered in the Copyright Office.

Section 19, and provided further, that if such subsisting copyright shall have been assigned or a license granted therein for publication, and if such assignment or license shall contain provision for payment of royalty, and if the renewed copyright for the extended term provided in this act shall not be assigned nor license therein granted to such original assignee or licensee or his successor, said original assignee or licensee or his successor shall nevertheless be entitled to continue to publish the work on payment of the royalty stipulated in the original agreement; but if such original assignment or license contain no provision for the payment of royalty, the copyright shall be renewed and extended only in case the original assignee or licensee or his successor shall join in the application for such renewal and extension.

Section 20. Omit altogether, so as to make rights of translation and dramatization co-terminal with copyright; or at least omit the words *dramatize or and dramatization* or and in the case of translation so as to secure co-terminal rights of dramatization.

Section 38, or any other separable right shall each be deemed a separate estate subject each in whole or in part. [Also] replace the words "to make any mechanical device by which music may be reproduced to the ear" with the words *to make any form of musical record*.

**MEMORANDUM OF THE COMMITTEE ON COPYRIGHT AND TRADE-MARK OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK: PREPARED FOR THE JOINT COMMITTEE OF THE SENATE AND HOUSE IN REFERENCE TO THE PENDING COPYRIGHT BILL.**

[S. 6330; H. R. 19853.]

It is a mistake to assume that the present copyright bill is an effort of any particular industry or interest to secure protection for itself at the cost of the protection due to others; in the draft as presented, no interest dominates; the draft is the result of compromise and concession made and yielded by all the various interests concerned in the perfection of the copyright laws.

As the distinguished writer, Mr. Walker, who has opposed certain portions of the bill, has himself attested, "It is high time that the whole system of legislation upon the subject should be put upon a scientific basis and should be developed in a scientific form. This bill is a sincere attempt to accomplish that result."

The need of such revision has been called to the attention of Congress by the President's message, and there is no dispute as to the timeliness of the effort now being made.

The committee of the Association of the Bar of the city of New York, which has taken part in a number of the conferences, has no other desire than to see an intelligible, fair, and liberal legislation upon the subject.

Some of the provisions in the bill were not entirely satisfactory to that committee; such provisions were accepted purely in the spirit of compromise and because they were pressed very earnestly and very intelligently by respectable bodies and were acceptable to a large body of the interests concerned in the proposed legislation.

In view of the full discussions had before this committee and the criticisms upon various features of the bill, the committee now begs to present, at the suggestion of the honorable Librarian of Congress, its views upon the most important of the suggestions made.

**SECTION 1.—*Subdivision (f).***

The public performance of a copyrighted musical work without permission of the copyright proprietor and *for profit* seems to this committee an obvious invasion of the rights of the composer. The words "for profit" should be inserted in this subdivision, and its insertion will answer all the objections made to this section. There might be some question as to whether a performance of a musical work to a large number of invited guests was or was not a public performance. Or the rendering of some musical work in a public hall to charity; children, for example, and the real purpose of the law will be accomplished by inserting the words "for profit."



SECTION 1.—*Subdivision (b).*

This subdivision provides that the copyright secured by the act shall include the sole and exclusive right:

"To sell, distribute, exhibit, or let for hire, or offer or keep for sale, distribution, exhibition, or hire, any copy of such (copyrighted) work."

It is insisted that this section, strictly construed, would prevent the purchaser of a copyrighted book from reselling it, or lending it, or giving it away, and the letting for hire of any such book, thus putting an end to circulating libraries—a conceded valuable and important factor in the education of the people.

It seems clear to this committee that this section merely intended to give to the author or proprietor of the copyright an exclusive right which would prevent others from selling, distributing or letting for hire an uncopyrighted book, in violation of the author's exclusive privilege.

But a strict construction of it, especially in connection with section 23, which defines an infringement of copyright to be the doing of "any act, the exclusive right to do or authorize which is by such laws reserved to such proprietor," would, in the opinion of this committee, include as an infringement a fair and proper use of a copyrighted book duly purchased and paid for.

It would be advisable to substitute for this subdivision (b), of section 1, the provisions of the present law (R. S., section 4952) and have it read as follows:

"The sole liberty of publishing, printing, reprinting, reproducing, completing, copying, executing, finishing, and vending the copyrighted work."

SECTION 1.—*Subdivision (g).*

The subdivision covers the manufacture, sale, or hiring out of musical contrivances for reproduction of music. The committee is clearly of opinion that this should not be covered. There is no infringement of any person's copyright by the making or selling of a machine that may reproduce sounds of copyrighted music. The only thing to which the owner of copyrighted music can object is that his copyrighted music shall be made use of in such machines without compensation.

That such compensation is proper is admitted by the most strenuous advocates of the talking-machine interests; notably, Mr. Barhn, whose draft of a proposed bill (section 39) proposes a rate of royalty fixed by law, and Mr. Low, who, at page 133 of the arguments before the joint committee, suggests that the use of copyrighted music by mechanical appliances shall be permitted upon payment of a royalty. Of course, the payment of a royalty for the use of copyrighted property is a matter which concerns the liberty of individual contract, and should be left where it belongs. The suggestions mentioned are a dangerous innovation which, if allowable, would be applicable to all classes of property protected by the copyright or patent laws, and would, as a natural sequence, soon involve the liberty to any publisher to republish a work upon payment of some royalty, the rate of which should be fixed by the lawmakers, and the liberty to any manufacturer to use any patent upon similar terms.

This subdivision should not make it an infringement of a copyright to make or sell the machine capable of reproducing music, but only the unauthorized use of copyrighted music on such machines, and should therefore read:

"To reproduce to the ear the whole or any material part of such copyrighted musical work by means of any device, contrivance, or appliance adapted to that purpose."

With reference to the protection of musical compositions against their reproduction by mechanical contrivances, it has been suggested that Congress, under the constitutional permission, can only protect "writings." In the very first copyright act of 1790 "maps and charts" were added to the words "book or books." As early as 1802 "prints" were protected by act of Congress, and as early as 1831 "musical compositions" were so protected. And the protection extended to these various works has been upheld by the courts from that time to this.

We have, therefore, a contemporaneous and continuous interpretation by Congress and by the courts that the word "writings" is not to be limited to printed matter, but can cover designs, prints, works of art, and musical compositions. It seems obvious to this committee that if the musical composition is entitled to protection it is not only against the reprinting of a musical score, but against any publication or reproduction of the composer's work. The musical composer's work is meant to be uttered in sound, and if science has discovered a method of reproducing that sound, thus taking possession of the very soul and essence of a musical composer's work without the medium of actual printing, the musical composer is entitled to protection against this new and more complete form of appropriation quite as much as he is entitled to protection from a stage performance of his opera or an orchestral performance of his symphony.

The inventors and manufacturers of this new sound-producing machine may, as indicated by several critics, purchase the right to use musical compositions by payment of a royalty, precisely as musical publishers do.

#### SECTION 4.

Criticism has been made that the simple term "works of an author" is too comprehensive, and might, in the language of one critic, include the work of a pastry cook.

If the honorable Joint Committee see any force in this suggestion, the mischief might be remedied by making the section read "all the intellectual works of an author." This would be in accord with the Supreme Court decision in *Higgins v. Keuffel* (140 U. S.), in which the constitutional provision is said to have "reference only to such writings and discoveries 'as are the result of intellectual labor,' and 'such (designs) as are original and are founded in the creative powers of the mind.'"

#### SECTION 5.—*Subdivision (g).*

Objection has been made to the term "works of art" as being more comprehensive than "writings."

We have already seen that the term "writings" has been broadened so as to include works of art almost from the beginning of copyright legislation.

## SECTION 5 (1).

Labels and prints relating to articles of manufacture, etc. The committee agrees with the criticism of Mr. Walker that these are not properly classifiable under a copyright law.

SECTION 8.—*Subdivision (a).*

The criticism of Mr. Olin that the word "or" should be "and," so as to give a foreigner a right to copyright if he is residing within the United States at the time of the publication of his work "and" makes the first publication therein, is accepted, and the committee is also of the opinion that in this subdivision the words "at the time of the making" should be amended, leaving the section to read:

"at the time of the first publication of his work."

The time of the making of the book is an uncertain designation and difficult to establish.

## SECTION 9.

Section 9 properly makes a copyright to depend upon the publication with notice of copyright. It is this notice which advises all outsiders of the proprietor's claim; it is proper that his rights should date from that time and not be lost to him during the interim necessary to comply with the regulations of section 11.

## SECTION 15.

Section 15 is a liberal enabling section, tending to secure to the owner of a copyright protection for one year against any errors or omissions in complying with the requirements of section 11. The proviso is added that no action shall be brought for infringement until such requirements have been fully complied with. The committee is not in favor of the amendment suggested by Mr. Walker, that even after compliance no action should be permitted "based on any infringement begun before the time of that compliance."

Notice of the copyright and the owner's claim thereto is required by section 9, and that notice is sufficient for third parties to refrain from violating the right so established.

In the opinion of the committee, however, there should be a provision inserted in this section that if the requirements for registration are not complied with within the extension of one year permitted by this section the copyright shall be deemed abandoned.

SECTION 15.—*Last paragraph.*

The last paragraph of section 15 is meant to protect the owner of a copyright against the forfeiture of his copyright by an inadvertent omission of the notice of copyright in "a particular copy or copies" of a large edition, provided he has sought to comply with the requirements of the act and the notice has been duly affixed to the bulk of the copies published.

The committee deems this a fair provision. A suggestion has been made, however, that in lieu of the words "the bulk of the edition pub-

lished," the line should read: "to the bulk of any and every edition published."

This amendment would make the intention more obvious, and is recommended.

#### SECTION 13.

The committee has already expressed its opinion that the protection of printers or typesetters should be compassed in some other way than by interference with the copyright of those entitled to it. But if this section is to remain, the committee is in accord with Mr. Walker's suggestion, that it should not be limited to typesetting or lithographic process, but should include any process.

The same objections to the clause itself are applicable to the requirement of an affidavit. The criticism has been made that a mere printer's affidavit made under this section, if false, would forfeit the owner's copyright. Upon reference to the section, however, it will be seen that the copyright is only forfeited by the "person" who knowingly makes a false affidavit for the purpose of obtaining a copyright. If such person make such willful affidavit "all his rights and privileges" are forfeited.

#### SECTION 14.

This section covers a mere matter of procedure, and is properly framed so as to reduce as much as possible the onus of the copyright notice to be affixed to paintings or other works of art. The only quarrel seems to be as to whether the term "some accessible portion of the work" should be enlarged by adding the words "and visible." The committee is of opinion that if it is accessible it can always be found if searched for, and this search very certainly should be put upon any person who desires to reproduce the work.

#### SECTION 18.—*Duration of copyright.*

There can be no question that the universal tendency has been and is toward more ample protection of copyright; not in the interest of creating monopolies, but because works entitled to copyright are usually of public service, and because by its nature copyright is so susceptible to invasion and appropriation.

The question of the duration of a copyright is, however, entirely a question of policy and not a question of law. As to the policy, admitting that the interests of the public are to be protected as against the rights or claims of the author, the question arises whether the interests of the public are really injured by a longer term of copyright.

As Mr. Clemens has suggested to the committee, the cases where the value of any copyright survives the term of forty-two years are exceedingly rare, and not sufficient to be a matter of public interest. When the vitality of the work does survive that period it is because the work is of singular intellectual or ethical value, and it may well be claimed that in such instances it is proper that proportionate protection be extended to the author in view of the great merit of his work.

The committee can see no force in the objection that a period covering the life of the author and a number of years beyond is not, in conformity with the Constitution, "a limited period," and it is of

opinion that the life of the author and such a term beyond as would protect his children in the enjoyment of the fruits of his labor is a fair and reasonable protection.

#### SECTION 20.

Limiting the exclusive right of the author to dramatize or translate any works in which copyrights exist to ten years.

It seems to the committee a reasonable assumption that if the author has not exercised that right, either by himself or through his licensees, within a period of ten years, he has abandoned any intention of doing so. At all events, with this notice on the statute books the author has ample time within ten years to have such a translation or dramatization made.

One critic has suggested the change of the word "produce" within ten years to "made" within ten years. It seems to the committee that the sense of produce is obvious, but the change if made could do no harm and would obviate such possible misconstruction as that of the critic in question.

#### SECTION 23.—*Remedies.*

The criticism of subdivision (b) giving to the copyright proprietor a right to the recovery of damages, "as well as all the profits which the infringer may have made," is properly subject to the criticism of Mr. Walker, that it seems to cover a double recovery. As a matter of fact an analogous section in the law covering design patents has always been interpreted in the alternative and double recoveries have not been had. (Act Feb. 4, 1887, ch. 105, 24 St., 387.)

The committee advises that instead of the words "as well as" the section should read "or, at his option, all the profits, etc."

The provision in the same subdivision (b) as to a minimum amount of damages is not new in the law. (See sec. 4965, R. S., as amended by act of Mar. 2, 1895.)

#### SECTION 23.—*Subdivision (c).*

The right to impound infringing material during the litigation, instead of applying to "all goods alleged to infringe a copyright," should be amended to read "all goods shown to the satisfaction of the court to infringe the copyright."

#### SECTION 23.—*Subdivision (d).*

The committee can see no objection to the clause which dooms to destruction all infringing reproductions of a copyright work, as well as the devices, plates, molds, matrices, or other means of multiplying such reproductions. This would not include the plant or machinery calculated to be used for other purposes, as suggested by Mr. Walker and Mr. O'Connell, but only such parts thereof as were used for the condemned reproductions.

SECTION 25.—*Penal provisions.*

This section does not, as suggested by Mr. Porterfield, extend any particular favor or protection of the criminal law to owners of copyright. It simply extends to this species of property a protection analogous to that extended to all other kinds of property. The main, if not the only difference between property protected by copyright and other property, is that unless notice is given in some formal way of such ownership, it is not always apparent to third parties. The statute has provided for the giving of such notice to third parties and the penalties for the violation of property rights are only inflicted upon persons who "knowingly and willfully" violate that right.

In order to protect innocent third parties the same section 25 makes it a misdemeanor, with fraudulent intent, to remove a copyright notice or insert a false notice of copyright.

The section seems to the committee to have been drawn with care and with moderation, and it sees no reason why punishment should not be meted out to the perpetrators of willful violation of rights of property secured under the copyright laws.

SECTION 30.—*As to importation of copyrighted books.*

The term importation of any "foreign edition or editions" may give rise to doubt, and the suggestion made by Mr. Walker of substituting the word "copy or copies" for "edition or editions" is advisable.

Also the substitution of the term "any other process" instead of "lithographic process," if the type-setting clause (section 13) is to be preserved.

## SECTION 32.

The provision allowing actions for infringement of copyright to be brought "in the district where the violation of any provision of this act has occurred," seems to this committee a departure from the general principles governing jurisdiction of persons, and was assented to in response to what seemed to be a very strong demand and in deference to the representation of holders of dramatic copyrights whose works were pirated by roving companies unreachable except by pursuit through the different districts of the United States.

In the opinion of the committee, however, more harm is likely to be worked by this extension of jurisdiction than good, and in its opinion suit should only be instituted "in the district of which the defendant is an inhabitant, or where he has a regular place of business." This last provision is a concession, but if any supposed infringer has sufficient permanency in a locality to have established a regular place of business there, he can not reasonably complain if he is brought into court there.

## SECTION 38.

The purpose of this section is to determine the separate estates subject to assignment with reference to copyright and should not include "the right to make any musical device by which music may be produced to the ear." This musical device seems, in the opinion of the

committee, to be classified under the patent laws, which afford ample protection for it, and it is not germane to a law protecting copyrights.

All of which is respectfully submitted for the consideration of the Joint Committee of the Senate and House.

PAUL FULLER, *Chairman.*

WM. G. CHOATE.

JOHN E. PARSONS.

ARTHUR H. MASTEN.

HENRY GALBRAITH WARD.

NEW YORK, *December 15, 1906.*

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DECEMBER 17, 1906.

PAUL FULLER, Esq.,  
*71 Broadway, City.*

DEAR MR. FULLER: I will ask you to excuse me from signing the report, for this reason: I am on the committee of the American Bar Association, and have been corresponding with Mr. Steuart in regard to criticisms of the bill, and while I concur in almost all that is said in the report you send me, there are a few points in respect to which I have expressed a contrary opinion. Unfortunately, I have been so pressed to-day, and am just about to take a train, that I can not go into particulars. I will keep the copy of your report and do this later, but I judge it is better to hand it in without my signature now, because time may be of importance and I may be compelled to be absent for several days.

Very truly, yours,

EDMUND WETMORE.

[Insert between pp. 410 and 411.]

**Errata in Following Compiled Substitute Draft. (Burton.)**

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**Page 411.**

Line 5 of Sec. 3, before the word "representing," change "or" to "of."

**In Notes to Section 3:—**

Line 1 of Note 2, change "*referred*" to "*preferred*".

Line 1 of Par. 2 of Note 3, after word "*means*" insert "*is*"; line 3, cancel last word "*and*" and substitute a dash (—); insert a dash (—) after quotation in next line.

**Page 412**

In first proviso of Subsec. (f) of Sec. 4, words "*literature or art to another*", should be transferred to preceding line, following the words "form of", making clause read:

"or conversion from one form of literature or art to another, or adaptation, rearrangement or new setting of music, whenever made or authorized", etc.

Next to last line of first proviso, Sec. 5, after word "*produce*", cancel article "*the*".

**Page 415.**

Third from last line of left-hand column, change "*seventeen*" to "*fifteen*".

**Page 416.**

Left-hand column, 4th line of Sec. 14, change "*five*" to "*four*"; line 10, change "*four*" to "*five*"; seventh line from end of same section, strike out "*five and six*", and substitute "*and five*".

**Page 418.**

Second par. of Sec. 18 (15), third line of par., before "advertising", change "*before*" to "*for*".

Insert following par. at end of this Section:

"No damages shall be recovered or penalties exacted on account of the infringement of the copyright of any such print or label unless each copy thereof issued by the authority of the proprietor shall be marked either as required in respect to books in Sec. 14 of this Act, or in lieu thereof, with the words 'Label Registered', followed either by the date or by the number of registration of the label in the Patent Office."



**In Notes to Sec. 18 (15):** After words "Patent Office," in second line, insert:

"with enlargement of the period for filing, analogous to the two-year limit allowed after public use with respect to applications for patents for inventions."

**Page 419.**

Right-hand column, note: After word "NOTE" insert: "The above is substantially Mr. Pound's proposition."

The matter in the right-hand column of this page, after word "royalties", twelfth line from foot, including continuation of same column on next page, should have been set full width of page. The parallel columns from commencement of paragraph should read thus:

"And all courts having jurisdiction to enforce the provisions of this Act shall have power to enforce the payment of such royalties prescribed by order of court or agreed on between the parties.

"And all courts having jurisdiction to enforce the provisions of this Act shall have power upon petition of such author or his assigns, or legal representatives, to compel accounting and payment of such royalties

"by any and all suitable means by which decrees and orders of courts of equity are lawfully enforceable", etc., to the end of the right hand column on page 420.

**Page 420.**

Last foregoing correction continued, as noted, on this page.

**Notes to Sec. 22 (19):** Last line, change "*being*" to "*deemed*".

**Page 422.**

Right-hand column, Sec. 33, should be spaced from Sec. 32; and opposite such space should stand in left-hand column, the two lines commencing, "Sec. 36".

**Page 425.**

The lines indicating "Sec. 49 (45)", "Sec. 50 (46)", "Sec. 51 (47)", "Sec. 52 (48)", "Sec. 53 (49)", "Sec. 54 (50)", should extend—as the numbers in parentheses indicate—across the page after Sec. 44 of right-hand column.

**Page 426.**

Line 3 of Sec. 58 (54), before "*without*", insert "*and*".

**SUBSTITUTE DRAFT. PREPARED BY COMPILATION BY MR. BURTON FROM HIS FORMER DRAFT (M. CLARK PIANO COMPANY) AND DRAFT OF MR. PORTERFIELD—AND SUNDRY SUGGESTIONS OF MR. POUND, MR. O'CONNELL, AND OTHERS, AT THE DECEMBER HEARINGS.**

A BILL To amend and consolidate the acts respecting copyrights.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.*

SECTION 1. That nothing in this Act shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication or use of such unpublished work without his consent or to obtain damages therefor.

SEC. 2. That nothing in this Act shall be construed to extend or curtail, broaden or diminish, any right or estate created, protected or arising under or by virtue of any previously subsisting statute, nor to render copyrightable any work which shall have fallen into the public domain before this Act shall have gone into effect, nor prevent, lessen, impeach, or avoid any remedy at law or in equity, which any party aggrieved by any infringement of a previously subsisting copyright might have had if this Act had not been passed, nor extend the remedies herein provided to any cases of infringement committed before the going into effect of this Act, and all suits or actions now pending in any court of the United States, arising under the copyright laws existing prior to the going into effect of this Act, shall be governed in all respects by the laws as existing prior to the enactment hereof.

SEC. 3 (see note 1). That copyright secured by this Act is the sole liberty of multiplying and vending (see note 2) copies of the copyrighted article, and in the case of a dramatic composition, whether musical or nonmusical, or a musical composition designed solely for public performance or performing (see note 3) or representing it or causing it to be performed or represented, at a place of public entertainment for price or admission charged to the auditors, and in the case of a lecture, sermon, or address, written and prepared for oral delivery, to deliver the same or cause any delivery (see note 3) thereof for profit.

*Notes to Section 3.*

NOTE 1.—Sections 3 and 4 are designed to distinguish sharply between two quite different things: (1) The right given to an author to derive profit from work already produced, and (2) the reservation to him of the privilege of future production of an outgrowth of that work.

This last, covered by Section 4, is in the nature of a caveat. If the outgrowth shall be produced during the caveat period, it will itself become a subject of full copyright protection; but the caveat privilege is not itself a true part of the original copyright.

NOTE 2.—The word "vending" is referred to a multiplicity of terms, because its long use in the statutes makes its meaning certain and, under the decisions, comprehensive.

NOTE 3.—The right granted is the control of the normal and chief means of dissemination for profit.

In respect to books this means the multiplication of copies. In respect to the other classes of work mentioned, it is their public performance or delivery. The two things are one in essence,—the advisability of including nondramatic orchestral music and "musical compositions designed solely for public performance" in the group of things of which the monopoly of public performance is given under copyright is very seriously doubted. Excision of this provision from the section will not mutilate it.

SEC. 4. That the further protection secured by this Act to authors shall include the sole and exclusive liberty:

(a) To make or authorize for publication, sale, distribution, or circulation, any translation into any other language or dialect of a book copyrighted under this Act.

(b) To make or authorize for publication, sale, distribution, or circulation, any abridgment, digest, or condensation of a work copyrighted under this Act.

(c) To make or authorize for publication, sale, distribution, or circulation, any adaptation, new arrangement, rearrangement, or new setting of any musical composition copyrighted under this Act.

(d) To make or authorize for publication, sale, distribution, or circulation, any dramatization of a nondramatic work copyrighted under this Act, or any conversion into nondramatic form of a dramatic work copyrighted under this Act.

(e) To make or authorize for publication, sale, distribution, or circulation, any pictorial presentation of a work pertaining to the art of sculpture copyrighted hereunder.

(f) To make or authorize for publication, sale, distribution, or circulation, any presentation by means of the sculptor's art of any pictorial work copyrighted hereunder.

*Provided*, Such translation, abridgment, digest, condensation, dramatization or conversion from one form of or adaptation, rearrangement or new setting of music, literature or art to another, whenever made or authorized, be copyrighted as an original work in the manner provided in this Act, and if published without copyright shall fall into the public domain, notwithstanding the subsistence of the copyright on the original or parent work.

*And provided further*, That the exclusive right of the author to translate, abridge, digest, or condense a copyrighted book, to dramatize a copyrighted nondramatic work, to convert a copyrighted dramatic work into a nondramatic work, to make an adaptation, new arrangement, rearrangement or new setting of a copyrighted musical composition, and to convert a work of the fine arts from pictorial to sculptural form, or from sculptural to pictorial form, shall continue for ten years after copyright was obtained on the original or parent work and no longer. And such exclusive right of translation shall, after the said period of ten years, be confined to the language or languages, dialect or dialects into which translations shall have been made and published within said period.

SEC. 5. Copyright under this Act shall be obtained only by or in the right of the author (see note 1), which term shall include also the designer, delineator, composer, or other sort of artist producer of any work entitled hereby to copyright protection. And such right to secure copyright shall be assignable and transmissible as personal estate.

*Provided*, That the arranger and producer of any device, or appliance, especially adapted, in any manner whatsoever, by or with the aid of any other mechanism or musical instrument, to reproduce to the ear any material part of any work published and copyrighted after this Act shall have gone into effect, and any person who, by the voice, or by playing upon any musical instrument or instruments, causes to be produced any such device, contrivance or appliance, shall be considered the author of the specific devices or appliances so produced and the same may be copyrighted under the provision of this Act by or in the right of such author, without prejudice to the right of any other person to independently arrange and produce the devices or appliances of the same or other sort for reproducing to the ear the same work.

*And provided, however*, That the copyright secured by this Act shall extend to the work of an author or proprietor who is a citizen or subject of a foreign state or nation, only when such foreign state or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection substantially equal to the protection secured to such foreign author under this Act; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto.

The existence of the reciprocal conditions aforesaid shall be determined by the President of the United States, by proclamation made from time to time, as the purposes of this Act may require.

*Provided* (see note 2), *however*, That the citizens or subjects of any foreign country shall not enjoy by virtue of this Act any greater rights or privileges of copyright in the United States than citizens of the United States are granted in such foreign countries, respectively, except as otherwise provided by existing treaties.

*Notes to section 5.*

NOTE 1.—The use of a single term, "author," with a broadening definition simplifies subsequent reference, preventing inferential limitations being drawn from the subsequent use of the single term where it would, in fact, be used to represent the group to avoid bungling construction.

The phrase "only in the right of the author," taken with the concluding clause declaring the right transmissible, avoids the awkward ambiguity involved in the phrase "author or proprietor" of the present statute and pending bill. The right can not, in fact, be alternative between the author and the proprietor.

NOTE 2.—The objection that the bill (which is the same as the present statute) gives foreign authors more rights here than our authors get abroad, can not be cured where treaties are in existence substantially in accordance with the present statute and bill. (See, for example, treaties with China and Japan, pages 100-104, Copyright Office Bulletin No. 3, 1906.)

SEC. 6 (see note 1). That the works for which copyright may be secured under this act shall include:

1. Books, which shall include works of whatever form, being the expression of intellectual conception in written language designed to be read by the eye, and substitutes therefor for the use of the blind, including the following subclasses, without excluding others not herein specified:

(a) Original works;

(b) Secondary, derived, or compiled works, including translations, dramatizations, and other conversions from one literary form into another, cyclopedic work, dictionaries, gazetteers, catalogues, digests, abridgements, and condensations;

(c) Composite or aggregated works, such as newspapers and other periodicals.

2. Works of the fine arts, both original and reproductions, comprising:

(a) Sculpture, including statuary, plastic works in relief or intaglio, cameo and intaglio cuttings, carvings (other than such as are ornamentation of articles of merchandise of utility), and plastic models of scientific or technical character;

(b) Paintings, drawings, engravings, etchings, lithographs, prints, and pictorial illustrations, by any process, photographs and photographic negatives, including photographs or negatives in series for representing action in successive stages, and transparencies for magic lanterns and the like.

(c) Models and designs intended to be perfected as works of the fine arts.

3. Maps, charts, and diagrams.

4. Musical compositions for the voice or for musical instruments, in any system of notation designed to be read by the eye, or substitutes for the same designed for the use of the blind.

5. Devices, appliances, and contrivances for reproducing to the ear speech or music, including:

(a) Interchangeable controllers for determining the music produced on automatic musical instruments or players.

(b) Interchangeable devices produced by the voice or by the audible playing of a musical instrument for reproducing the matter thus vocalized or rendered audible.

(c) Interchangeable telephonic or telegraphic records automatically produced by the sound-recording or transmitting devices of telephone or telegraph.

6. Labels and prints of artistic or literary character relating to articles of manufacture and registerable in the Patent Office under any statute now or hereafter in force.

*Notes to section 6.*

This classification is such that the several classes are mutually exclusive, and in this respect it is believed to be much more logical, convenient, and certain in interpretation than the statutes or pending bill, in which the terms of different classes, particularly in the use of the word "books" reach into or overlap the description of other classes.

The subclasses are chiefly for convenience of subsequent reference and are not necessarily mutually exclusive (see sec. 7); e. g., subclass (b) of class 1 is made for convenience of reference if it should be thought advisable to make a longer term for original than derived or compiled work, as has been suggested by some. Subclass (c) of class 1 is made partly for convenient reference back from section 14, providing for single notice on "composite" works.

SEC. 7. That the descriptions of the several classes of copyrightable works contained in subsections one to six, inclusive, of section 6 shall be taken as mutually exclusive, so that no work falling in any one of said classes shall be included in any other class; but the description of the subclasses in each class shall not be taken as mutually exclusive.

*Provided, however,* That mistake as to classification shall not invalidate or impair the copyright protection secured under this Act, but the same shall be

limited according to the true classification, regardless of the class to which the work is assigned by the applicant in his application for registration.

SEC. 8. That no copyright obtained pursuant to this Act upon any revision, abridgment, condensation, digest, dramatization, translation, compilation, rearrangement, adaptation, or conversion from one form of literature or art into another, of any previously existing work, whether copyrighted or in the public domain, shall affect the force or validity or any subsisting copyright, or validate or revive any expired, invalid, or forfeited copyright upon the matter employed, or any part thereof, or be construed to grant any exclusive right to such use of the original works, but shall only protect the new matter.

SEC. 9. That no copyright shall be acquired under this Act by any person in any publication of the United States Government, or of any State or Territorial government, or any reprint in whole or in part thereof; or in any opinion delivered by a judge or other officer of the United States, or of any State, Territory, or district in the performance of his official duties; or in any report, letter, or other document composed, prepared, written, promulgated, or issued by any executive or administrative officer, civil or military, of the United States, or of any State, Territory, or District, or political division thereof in performance of his official duties; any statute, ordinance, rule, by-law, or public record of the United States, or of any State, Territory, or District, or political division thereof, or of any corporation or association of any kind whatsoever; the original text of a work by any author not a citizen of the United States first published without the limits of the United States prior to July first, eighteen hundred and ninety-one; or in the original text of any work which has fallen into the public domain; or in anything of an obscene, indecent, or immoral nature whereby the morals of the people may be corrupted: *Provided, however,* That the publication or republication by the Government, either separately or in a public document, of any material in which copyright is subsisting shall not be taken to cause any abridgment or annulment of the copyright, or to authorize any use or appropriation of such copyrighted material without the consent of the copyright proprietor.

SEC. 10 (see note 1). That any person entitled thereto by this Act may secure copyright for his work by publication thereof with the notice of copyright required by this Act; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor. In the case of a work of the fine arts or a plastic work or drawing, such notice shall be affixed to the original also, before any public exhibition of such original. In case of composite works (subclass (c) class 1, section 6) a single notice on each copy shall suffice.

SEC. 10 (see note 1). That no person shall be entitled to a copyright unless he shall, on or before the day of publication in this or any foreign country, deliver at the office of the Register of Copyrights or deposit it in the mail within the United States, addressed to the Register of Copyrights, at Washington, District of Columbia, a printed copy of the title of the book, or other article for which copyright is desired, or a description of the article, if it bears no title; nor unless he shall also, not later than the day of the publication thereof in this or any foreign country, deliver at the office of the Register of Copyrights, at Washington, District of Columbia, or deposit in the mail within the United States, addressed to the Register of Copyrights, at Washington, District of Columbia, two copies of such copyrighted book, or other article, copies of which are designed to be multiplied by printing or other process, or in case of a painting, drawing, statue, statuary, model, or design, a photograph of the same.

SEC. 11. That in order to obtain registration of claim to copyright on behalf of the claimant, not later than thirty days (but in the case of a periodical not later than ten days) after the publication of the work upon which copyright is claimed, there shall be deposited in the Copyright Office or in the United States mail addressed

to the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition; or if a contribution to a periodical for which contribution special registration is requested, one copy of the issue or issues of the periodical containing such contribution, to be deposited not later than ten days after publication; or if the work is not reproduced in copies for sale, there shall be deposited the copy, print, photograph, or other identifying reproduction, such deposit to be accompanied in each case by a claim of copyright.

SEC. 12. Within sixty days (but in case of a periodical, within fifteen days) after publication of the work upon which copyright is claimed, there shall be filed in the office of the Register of Copyrights, at Washington, D. C., a petition for registration, stating under oath (a) the name and residence of the petitioner; (b) the title and the fact and place of publication of the work of which copyright is claimed; (c) that each and every copy of each and every edition of said work published has contained the notice of copyright required by this Act; (d) that said work had not, to the knowledge of the petitioner, been previously published; (e) that the petitioner is the author or proprietor of such work, as the case may be.

If the copyright is claimed for a proprietor not the author, unless the petition under oath states that by the desire of the author the work was published anonymously and that the author still desires to remain unknown, or that the authorship is unknown to the petitioner, such petition shall be accompanied by a written instrument, signed by the author, and acknowledged before an officer competent to take acknowledgment of deeds, expressly assigning the work, or the right to copyright the same, to the person by whom copyright is claimed in said petition, and also an affidavit (which may be embodied in such assignment) that the affiant is the author of such work.

Registration obtained by compliance with this section, or section seventeen hereof, shall be prima facie evidence of ownership of the copyright.

*Notes to sections 10, 11, and 12.*

The left-hand column throughout this draft, wherever it is double columned, presents Mr. Burton's preference or recommendation; the right-hand column, Mr. Porterfield's. The parenthetical numbers of sections not double columned are the numbers belonging to these sections in the bill as made up with the second-column sections instead of the first-column sections.

Section 10 of second column substantially reenacts the present statute. Sections 10, 11, and 12 of the first column adopt the proposed new method of copyrighting by publication with notice and subsequent registration.

SEC. 13 (11). That the postmaster to whom are delivered the articles required to be deposited under section ten above shall, if requested, give a receipt therefor, and shall mail them to their destination without cost to the copyright claimant.

SEC. 14. That notice of copyright required by section ten shall consist (a) in the case of any work specified in the subsections one, three, and five of section six of this Act, of the word "copyright," or the word "copyrighted," accompanied by the name of the author or copyright proprietor as registered in the Copyright Office, and the year of original publication; (b) in the case of any work specified in subsections two and four of section six, either the word "copyright" or "copyrighted," or the letter C enclosed within a circle thus, © : *Provided* (see note), That on some accessible portion of the work, or of the margin, back, permanent base or pedestal thereof, or of the substance on which the work shall be mounted, the name of the author or copyright proprietor as registered in the Copyright Office shall appear, together with the year of original publication; but in the case of works in which copyright was subsisting when this Act shall go into effect the notice of copyright may be either in one of the forms prescribed herein or in some of those prescribed by the Act of June eighteenth, eighteen hundred and seventy-four.

Such notice of copyright shall be applied, in the case of a book or other printed publication, upon its title-page or the page immediately following, or, if a periodical, either upon the title-page or upon the first page of text of each separate number, or under the title heading; and in the case of a work specified in subsections two, three, four, five, and six of section six of this Act, except as hereinabove in this section provided, upon some accessible portion of the work itself, or of the margin, back, permanent base or pedestal thereof, or of the substance on which the work shall be mounted.

SEC. 12. That no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title-page or the page immediately following, if it be a book, or, if it be any of the other articles enumerated in section six of this Act, by inscribing on some visible portion thereof, or of the substance on which the same shall be mounted, the following words, viz: "Entered according to Act of Congress, in the year ———, by A B, in the office of the Librarian of Congress, at Washington," or, at his option, the word "copyright," together with the year the copyright was entered, and the name of the party by whom it was taken out; thus: "Copyright, 19—, by A B."

Manufacturers of designs for molded decorative articles, titles, plaques, or articles of pottery or metal subject to copyright may put the copyright mark prescribed herein on the back or bottom of such articles, or in such other place on them as it has heretofore been usual for manufacturers of such articles to employ for the placing of manufacturers', merchants', and trademarks thereon (see note); and on other works of the fine arts the required mark may be applied upon the back or any unexposed part, provided such mark shall be plain and of sufficient size to be readily discoverable by sufficient search.

*Notes to section 14 (12).*

Art works are exempted from the requirement of exposed marking except by the cabalistic sign of ©

SEC. 15. That if, by reason of any error or omission, the requirements prescribed above in section ten have not been complied with within the time therein specified, or if failure to make registration has occurred by the error or omission of any administrative officer or employee of the United States, it shall be permissible for the author or proprietor to make the re-

quired deposit and secure the necessary registration within a period of one year after the first publication of the work: *Provided*, That in such case there shall be no right of action for infringement of the copyright until such requirements have been fully complied with or be based on any infringement begun before the time of that compliance: *And provided further*, That the privilege above afforded of completing the registration and deposit after the expiration of the period prescribed in section twelve shall not exempt the proprietor of any article which bears a notice of copyright from depositing the required copy or copies upon specific written demand therefor by the Register of Copyrights, who may make such demand at any time subsequent to the expiration of such period; and after the said demand shall have been made, in default of the deposit of the copies of the work within one month from any part of the United States except an outlying territorial possession of the United States or from any foreign country, the proprietor of the copyright shall be liable to a fine of one thousand dollars.

But such deposit upon such demand of the Register of Copyrights, after one year from the date of publication, shall not render the copyright valid. (See note.)

Where the copyright proprietor has sought to comply with the requirements of this Act as to notice and the notice has been duly affixed to the bulk of each edition published, its omission by inadvertence from a particular copy or copies, though preventing recourse against an innocent infringer without notice, shall not invalidate the copyright nor prevent recovery for infringement against any person who, after actual notification of the copyright, begins an undertaking to infringe it.

*Notes to section 15a.*

Adopting the provisions of the bill allowing one year for registration in case of oversight and permitting the Register of Copyrights at any time to demand the filing of copies of a book which has been published with copyright mark, it is considered important to provide against the validation of the copyright which under the bill it would seem would be caused by the Register calling for such copies after the expiration of the year. This would open the way for great fraud, permitting a publication to be made with notice of copyright but without actual registration until after the work should have been taken up and published by others knowing it was not registered. Thereupon a third party in the interest of the original publisher calling the Register's attention to the non-registration would cause him to demand registration (innocent of the fraud intended), and thereupon the copyright being validated large damages would accrue from the second publication.

**SEC. 16 (13).** In case of any book which consists either in whole or in part of matter collected, compiled, or selected from previously copyrighted works, the reproduction and publication in such form of the previously copyrighted matter shall not in anywise affect or impair such previous copyrights, though the titles of such previously copyrighted works and the original notices of the copyrights



equity, have power to extend to the claimant of such royalties, such preliminary protection in respect thereto as may be deemed equitable, by requiring bond to secure the payment of such royalties as may be awarded in lieu of a preliminary injunction, and upon failure thereof to grant such preliminary injunction.

*Notes to section 22 (19).*

Two suggestions as to method of providing for the royalty contemplated in this section are presented in the parallel-column portion of the section. It has been suggested that 2 cents is very much too high royalty for graphophone rolls and the like, and it would be competent and probably unobjectionable to the makers of perforated rolls for piano players and the like to make a distinction in the act between these different classes of devices. The suggestion comes from some of the perforated roll makers that a 1-cent royalty for perforated rolls and a quarter of a cent royalty for phonograph cylinders, etc., would be about right, if a flat rate is being the preferable method.

SEC. 23. That the copyright secured by this Act shall endure for — years from and including the year of first publication hereunder, with respect to all subjects of copyright named therein, except devices or appliances for reproducing speech of music to the ear; and as to such devices and appliances, the term of copyright secured hereunder shall be seventeen years only, including the year of first publication or production in multiple for sale, of such device or appliance, and shall in any event expire at the same time as the copyright on the composition containing the speech or music reproduced to the ear. (See note.)

*Provided, however,* That in all cases the term shall extend to the end of the calendar year of expiration.

SEC. 20. That copyrights shall be granted for the term of twenty-eight years from the time hereinafter directed. And at the expiration of the said term the same exclusive right shall be continued for the further term of fourteen years to the author or authors and his or their personal representatives, legatees, and assigns, on causing the title of the work or description of the articles so secured to be recorded a second time in the Copyright Office within six months before the expiration of the first term.

*Note to section 23 (20).*

The first column form of this section makes no provision for extension. Such provision, however, may be easily inserted if deemed advisable, but should not relate to the devices for automatic reproductions to the ear, and may be made to relate to certain classes only of section 6.

SEC. 24 (21). That of a printed book or periodical the copies deposited under section 10 of this Act shall be bound (see note) within the limits of the United States, and the text thereof shall be printed (see note) within the limits of the United States, from type set within the limits of the United States, either by hand or by the aid of any kind of typesetting or type producing (see note) machine, or from plates made within the limits of the United States, from type set within the limits of the United States, or if the text be produced by any other device or process, then by a process wholly performed, both as to the preparation (see note) of the device and as to the printing (see note) therewith, within the limits of the United States; which requirements shall extend also to the illustrations produced by any device or process, contained within a printed book, consisting of text and illustrations, and also to separate illustrations, except where in either case the subjects represented by such illustrations are located in a foreign country; but they shall not apply to works in raised characters for the use of the blind, and they shall be subject to the provisions of section nineteen (sixteen) of this Act, with reference to books published abroad seeking ad interim protection under this Act.

In the case of the book the copies so disposed shall be accompanied by an affidavit, under the official seal of any officer authorized to administer oaths

within the United States, duly made by the person claiming copyright or by his duly authorized agent or representative residing in the United States, or by the printer who has printed the book, setting forth that the copies deposited have been printed in the United States from type set within the limits of the United States, or if the book be wholly or partly produced by some other process, that such process was wholly performed within the limits of the United States.

Any person who for the purpose of obtaining a copyright shall knowingly be guilty of making a false affidavit as to his having complied with the above conditions shall be liable to all the pains and penalties of perjury, and the copyright so obtained shall be void.

Such affidavit shall state also the place within the United States, and the establishment in which such type was set or plates were made or lithographic process was performed and the date of the completion of the printing of the book or the date of publication.

*Note to section 24.*

It will be observed that this section provides for the entire manufacture to be performed in the United States, not including, however, the manufacture of the raw material (paper or ink).

SEC. 25. That every assignment of copyright under this Act shall be by an instrument of writing signed by the assignor. If such instrument is acknowledged before an officer competent at the place of acknowledgment to take acknowledgment of deeds, the certificate of such acknowledgment under the hand and official seal of such officer, shall be prima facie evidence of the execution of the instrument.

That every assignment of copyright executed in a foreign country shall be acknowledged by the assignor before a consular officer or secretary of legation of the United States authorized by law to administer oaths or perform notarial acts. The certificate of such acknowledgment under the hand and official seal of such consular officer or secretary of legation shall be prima facie evidence of the execution of the instrument.

That every assignment of copyright shall be recorded in the Copyright Office within ninety days after its execution in the United States or within six calendar months after its execution without the limits of the United States, in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, whose assignment has been duly recorded.

SEC. 22. That copyrights shall be assignable in law by any instrument in writing, signed by the assignor, and shall be recorded in the Copyright Office within sixty days after its execution; in default of which it shall be void as against any subsequent purchaser, assignee, licensee, or mortgagee without notice. And except as hereinafter provided every such assignment shall operate to vest in the assignee all rights secured by copyright obtained under the provisions of this Act.

NOTE.—If provision for an extended term is incorporated in the Act, the following alternative provisions are suggested, to wit:

I. (Continue from words "provisions of this Act," above, as follows:—"including the right of renewal for an additional term.")

Or, instead, add the following suggested by Mr. Johnson:

In case any subsisting copyright shall have been assigned or a license shall have been granted thereunder for publication, and if such assignment of license shall contain provisions for payment of royalty, and if the renewal term provided in this Act shall not be assigned nor license therein granted to such original assignee, or licensee, or his successor, said original assignee or licensee or his successor, shall nevertheless be entitled to continue to publish the work on payment of the royalty stipulated in the original agreement; but if such original assignment or license contain no provision for the payment of royalty, the copyright shall be renewed and extended only in case the original assignee or licensee or his successor shall join in the application for such renewal and extension.

Rights of translation, conversion into nondramatic form, dramatization, abridgment, digest and condensation, adaptation, new arrangement, rearrangement or new setting of a musical composition, and conversion from one form of the fine arts to another, shall not pass by assignment of the copyright only, but shall remain reserved to the author unless conveyed and assigned by him in express terms. Such assignment of such reserved rights may be made by the author and recorded in the copyright office in the manner provided in this act with respect to assignments of copyrights.

SEC. 26. (23). That the Register of Copyrights shall, upon payment of the prescribed fee, record such assignment, and shall return to the sender, with a certificate of record attached, under seal, the original instrument or the copy of the same so filed for record; and upon the payment of the fee prescribed by this Act, he shall furnish to any person requesting the same a certified copy thereof, under the seal of the copyright office.

Such certified copy of an assignment shown thereby to have been duly acknowledged, as provided in section 24 of this act, shall be competent evidence in any court of the contents and due execution of the instrument so recorded.

SEC. 27 (24). That when an assignment of the copyright in a specified book or other work has been recorded, the assignee shall have the privilege of substituting his name for that of the assignor in the statutory notice of copyright prescribed by this act.

NOTE.—Here follow with sections 46, 47, 48, 49, 50, 52 of bill, numbered respectively: section 28 (25), section 29 (26), section 30 (27), section 31 (28), section 32 (29), section 33 (30), section 34 (31).

SEC. 35. Reproduce section 53 of bill.

SEC. 32. That the Register of Copyrights shall provide and keep such record books in the Copyright Office as are required to carry out the provisions of this Act, and whenever a copy of a title or description of any work with an application for copyright shall be received at the Copyright Office through the mail or otherwise, the Register of Copyrights shall have no power to refuse to record such title or description, but shall forthwith record the same in the proper book kept for that purpose, in the words following: "Library of Congress, to wit: Be it remembered that on the — day of —, A. B., of —, hath deposited in this Office the title of a book (map, chart, or otherwise, as the case may be, or description of the article), the title or description of which is in the following words, to wit: (here insert the title or description) the right whereof he claims as author (originator, or proprietor, as the case may be), in conformity with the laws of the United States respecting copyrights. C. D., Librarian of Congress." And he shall transmit a copy of such record under the seal of the Copyright Office, to the copyright proprietor.

SEC. 36. Reproduce section 54 of the bill.

SEC. 37. Reproduce section 55 of the bill.

SEC. 33. Section 55 of the bill, *omitting* the following: "The current catalogues of copyright entries and the index volumes herein provided for shall be admitted in any court as prima facie evidence of the facts stated therein as regards any copyright registration."

SEC. 38 (34). Reproduce section 56 of the bill.  
 SEC. 39 (35). Reproduce section 57 of the bill.  
 SEC. 40 (36). Reproduce section 58 of the bill.

SEC. 37. That in case of any book or other articles which the Librarian of Congress may determine is not suitable for preservation in the Library of Congress, the Register of Copyrights shall mark on each copy of the same the number of copies deposited, and the name of the person by whom the deposit is made, the date of such deposit, and also enter the fact that such deposit was made in the proper record book, and thereupon return such copies to the owner thereof.

SEC. 41 (38). Reproduce section 59 of the bill.

SEC. 42. Reproduce section 60 of the bill changing only in lines 11 and 12 of page 38 so as to read: "specified in paragraphs (a) (b) of subsection 2 of section 6 of this act.

SEC. 39. Reproduce section 60 of the bill, omitting both provisos, ending, therefore, with the word "article" in line 1 of page 38.

SEC. 43 (40). That every person who, without the consent of the author or proprietor first obtained, shall publish or reproduce in any manner whatsoever any unpublished copyrightable work shall be liable to the author or proprietor for all damages occasioned by such injury, and to an injunction restraining such unauthorized publication.

SEC. 44 (41). That any person who shall insert or impress the notice of a copyright required by this Act, or words of the same purport, in or on any article for which copyright has not been obtained in the United States, or shall cause the same to be done, or shall sell or issue, or import from any foreign country, any article known to him to contain such false notice of copyright, shall be liable to a penalty of one hundred dollars, recoverable one-half for the person who shall sue for such penalty and one-half to the use of the United States.

SEC. 45. That if any person shall infringe the copyright in any way protected under this Act by doing or causing to be done, without any lawful authority or right, any act the exclusive right to do, or authorize which, is by this Act copyright proprietor, such person shall be liable—

(a) To injunction restraining such infringements.

(b) To pay the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, or, at the option of the copyright proprietor, all the profits which the infringer may have made from such infringement:

*Provided, however,* That without evidence of either actual damages or profits, damages may at the discretion of the court be assessed upon the following basis, but shall in no case exceed the sum of \$5,000, and shall not be regarded as penalty:

First, in the case of a painting, statue, or sculpture, at the rate of \$10 for every infringing copy made or sold by or found in the possession of the infringer or his agents or his employees.

SEC. 42. That every person who shall have been aggrieved by any violation of any right secured by this Act, may, at his option, maintain a bill in equity for an injunction, or bring an action at law to recover damages for the violation of such right. In such action at law the plaintiff, in lieu of actual damages, may sue for and recover such damages as to the court shall appear just, to be assessed by the jury at the rate of not less than one dollar for each infringing copy and not less than fifty dollars for each infringing performance in the cases in which public performance is protected.

and to hear and determine a motion to dissolve the same, as herein provided, as fully as if the action were pending or brought in the district in which said motion is made.

The clerk of the court, or judge granting the injunction, shall, when required so to do by the court hearing the application to dissolve or enforce said injunction, transmit without delay to said court a certified copy of all the papers on which the said injunction was granted that are on file in his office.

In any action at law arising respecting copyright the defendant may plead the general issue and give special matter in evidence upon reasonable notice to complainant before the trial.

SEC. 58 (54). That any person who shall infringe the copyright of any work copyrighted under the laws of the United States, with knowledge of the copyright, without reasonable grounds for believing that he has a lawful right to publish the infringing work, shall be guilty of a misdemeanor, and on conviction thereof shall be punished by imprisonment not exceeding one year, or by a fine of not less than one hundred dollars, or both, in the discretion of the court, and required to pay the costs of the proceeding.

SEC. 59 (55). That no suit or action, either at law or in equity, shall be maintained for any infringement of copyright unless the same shall be commenced within six years after the cause of action has arisen, or the plaintiff or his predecessors in interest had knowledge of such infringement, or of facts sufficient to put him or them on inquiry; nor shall any action be maintained to recover any forfeiture or penalty under the copyright law, unless the same shall be commenced within two years after the cause of action has arisen.

SEC. 60 (56). That the final orders, judgments, or decrees of any court mentioned in section twenty-one of this Act, arising under the copyright laws of the United States, may be reviewed on appeal or writ of error in the manner and to the extent now provided by law for the review of cases finally determined in said courts, respectively.

SEC. 61 (57). Reproduce section 61 of the bill.

SEC. 62 (58). Reproduce section 62 of the bill and add thereto, with appropriate change of punctuation, the words: "action shall be construed to include any suit, action, or proceeding which may be brought under the provisions of this Act; the words 'the date of publication' shall, in the case of a work of which copies are reproduced for sale or distribution, be held to be the earliest date at which copies of the first authorized edition were sold or placed on sale; the word 'offer' shall include an employer in case of works made for hire, and an editor in the case of periodicals and compilations."

SEC. 63 (59). That this Act shall go into effect on the — day of——, after its passage.

SEC. 64 (60). That the following acts and parts of acts relating to copyrights are hereby repealed: Act of May 31, 1790 (chap. 15, 1 Stat. L., 124); act of April 29, 1802 (chap. 36, 2 Stat. L., 171); act of February 15, 1819 (chap. 19, 3 Stat. L., 481); act of February 3, 1831 (chap. 16, 4 Stat. L., 436); act of June 30, 1834 (chap. 157, 4 Stat. L., 728); act of August 10, 1846 (chap. 178, sec. 10, 9 Stat. L., 106); act of March 3, 1855 (chap. 201, sec. 5, 10 Stat. L., 685); act of August 18, 1856 (chap. 169, 11 Stat. L., 138); act of February 5, 1859 (chap. 22, sec. 8, 11 Stat. L., 380); act of February 18, 1861 (chap. 37, 12 Stat. L., 130); act of March 3, 1865 (chap. 126, 13 Stat. L., 540); act of February 18, 1867 (chap. 43, 14 Stat. L., 395); act of July 8, 1870 (chap. 230, secs. 85-111, 16 Stat. L., 212); act of June 8, 1872 (chap. 335, sec. 184, 17 Stat. L., 283); act of June 18, 1874 (chap. 301, 18 Stat. L., 78); act of March 3, 1879 (chap. 180, 20 Stat. L., 359); act of March 3, 1891 (chap. 565, 26 Stat. L., 1106); act of March 3, 1893 (chap. 215, 27 Stat. L., 743); act of March 2, 1895 (chap. 194, 28 Stat. L., 965); act of January 6, 1897 (chap. 4, 29 Stat. L., 481); act of March 3, 1897 (chap. 392, 29 Stat. L., 694); act of March 3, 1905 (chap. 1432, 33 Stat. L., 1000).

**SUBSTITUTE DRAFT SUBMITTED BY CHARLES PORTERFIELD.**

A BILL To amend and consolidate the Acts representing copyrights.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

That copyright within the meaning of this Act is the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the copyright work.

That copyright within the meaning of this act is the sole and exclusive right to multiply copies of the copyrighted work, and to sell, distribute, circulate or otherwise dispose of the same.

SEC. 2. That the copyright secured by this Act shall also include the sole and exclusive right:

(a) In the case of a copyrighted dramatic composition, whether musical or nonmusical, to perform or represent it at any theater or other place of public entertainment, and to cause it to be so performed or represented by others;

(b) In the case of a copyrighted picture, statue, or other work of the fine arts, to make any model of the same, or any photograph, drawing, or other pictorial representation thereof. And also to reproduce and make any copies whatsoever of the photographs of such works required by this Act to be deposited in the office of the Register of Copyrights:

(c) In the case of any copyrighted lecture, sermon, or address written and prepared for occasional oral delivery, to deliver the same or cause any delivery thereof for profit;

(d) To dramatize a copyrighted nondramatic work and to perform or represent it and to cause it to be performed or represented by others at any theater or other place of public entertainment; and also to convert a copyrighted dramatic work into a novel or other nondramatic work;

(e) To translate a copyrighted literary composition into any other language or dialect;

(f) To make any abridgment of a copyrighted literary composition;

(g) To make any adaptation, new arrangement, rearrangement, or setting in any system of notation of any copyrighted musical composition;

(h) To perform for profit at any theater, auditorium, or other place of public entertainment any copyrighted musical work designed exclusively for public performance.

*Provided, however,* that the exclusive right to dramatize a copyrighted nondramatic work and represent it on the stage; to convert a copyrighted dramatic work into a nondramatic work; to make an abridgment of, or to translate, a copyrighted literary composition; and to make an adaptation, new arrangement, rearrangement, or setting in any system of notation of any copyrighted musical composition, shall continue for ten years after copyright was obtained on the original work and no longer. And such exclusive right of translation shall, after the said period of ten years, be confined to the language or languages, dialect or dialects into which translations shall have been made and published within said period.

SEC. 3. That the author, inventor, designer, delineator, or proprietor of any of the works named and described in section four of this act, and the executors, administrators, and assigns of any such person may obtain copyright therefor on complying with the provisions of this act. *Provided, however,* That the copyright secured by this Act shall extend to the work of an author or proprietor who is a citizen or subject of a foreign state or nation, only when such foreign state or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection substantially equal to the protection secured to such foreign author under this Act; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may at its pleasure become a party thereto.

The existence of the reciprocal conditions aforesaid shall be determined by the President of the United States, by proclamation made from time to time, as the purposes of this Act may require.

SEC. 4. That the works for which copyright may be secured under this Act shall include:

- (a) Books, including newspapers;
- (b) Maps and charts;
- (c) Dramatic compositions;
- (d) Musical compositions;
- (e) Engravings, cuts, prints, photographs and negatives thereof, paintings, drawings, chromos, and other pictorial representations produced by any process or method whatsoever;
- (f) Statues and statuary;
- (g) Models and designs intended to be perfected as works of the fine arts;
- (h) Drawings and plastic works of a decorative, scientific, or technical character;
- (i) Labels and prints relating to articles of manufacture, as heretofore registered in the Patent Office under the Act of June 18, 1874.

SEC. 5. That translations and abridgments of copyrighted literary compositions, dramatizations of copyrighted nondramatic works, conversions of copyrighted dramatic works into nondramatic works, and adaptations, new arrangements, rearrangements, and settings in any system of notation of copyrighted musical compositions shall be deemed new works, subject to copyright under the provisions of this act.

SEC. 6. That new editions of any copyrighted book containing new matter are subject to copyright under the provisions of this Act, and if not so copyrighted, the new matter therein contained shall fall into the public domain by publication thereof, but such copyright shall operate only to protect such new matter.

SEC. 7. That no copyright shall be acquired under this Act by any person in any publication of the United States Government or of any State or Territorial government, or any reprint in whole or in part thereof; or in any opinion delivered by a judge or other officer of the United States, or of any State, Territory, or District, in the performance of his official duties; or in any report, letter, or other document composed, prepared, written, promulgated, or issued by any executive or administrative officer, civil or military, of the United States, or of any State, Territory, or District, or political division thereof, in performance of his official duties; any statute, ordinance, rule, by-law, or public record of the United States, or of any State, Territory, or District, or political division thereof, or of any corporation or association of any kind whatsoever; the original text of a work by any author not a citizen of the United States first published without the limits of the United States prior to July first, eighteen hundred and ninety-one; or in the original text of any work which has fallen into the public domain; or in anything of an obscene, indecent, or immoral nature whereby the morals of the people may be corrupted: *Provided, however,* That the publication or republication by the Government of the United States, or by any State or Territory, either separately or in a public document, of any material in which copyright is subsisting shall not be taken to cause any abridgment or annulment of the copyright, or to authorize any use or appropriation of such copyrighted material without the consent of the copyright proprietor.

SEC. 8. That copyrights shall be granted for the term of twenty-eight years from the time of recording the title thereof, in the manner hereinafter directed. And at the expiration of the said term the same exclusive right shall be continued for the further term of fourteen years to the author or authors and his or their personal representatives, legatees, and assigns, on causing the title of the work or description of the articles so secured to be recorded a second time in the Copyright Office within six months before the expiration of the first term.

SEC. 9. That no person shall be entitled to a copyright unless he shall, on or before the day of publication in this or any foreign country, deliver at the office of the Register of Copyrights, or deposit in the mail within the United States, addressed to the Register of Copyrights, at Washington, District of Columbia, a printed copy of the title of the book, or other article for which copyright is desired, or a description of the article, if it bears no title; nor unless he shall also, not later than the day of the publication thereof in this or any foreign country, deliver at the office of the Register of Copyrights, at Washington, District of Columbia, or deposit in the mail within the United States, addressed to the Register of Copyrights, at Washington, District of Columbia, two copies of such copyrighted book, or other article, copies of which are designed to be multiplied by printing or other process, or in case of

a painting, drawing, statue, statuary, model, or design, a photograph of the same; and the Register of Copyrights shall mark each of such copies with the date of the receipt thereof at the Copyright Office: *Provided*, That in the case of a book, photograph, chromo, or lithograph, the two copies of the same required to be delivered or deposited as above shall be printed from type set within the limits of the United States, or from plates made therefrom, or from negatives, or drawings on stone or other process, made within the limits of the United States, or from transfers made therefrom. But this proviso shall not apply to any photographic negatives, lithographs, or other pictorial illustrations representing subjects in a foreign country, and which for that reason can be made only in the view of the subjects represented; neither shall it apply to works in raised characters for the use of the blind, nor to works published in a foreign country for which *ad interim* protection is sought.

SEC. 10. That the postmaster to whom such title or description of a book or other article, or copies of such book or other article are delivered, addressed to the Register of Copyrights, at Washington, District of Columbia, shall, if requested, give a receipt therefor; and when so delivered he shall mail the same to their destination.

SEC. 11. That no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title-page or the page immediately following, if it be a book, or, if it be any of the other articles enumerated in section three of this Act, by inscribing on some visible portion thereof, or of the substance on which the same shall be mounted, the following words, viz.:

"Entered according to Act of Congress, in the year —, by A. B., in the office of the Librarian of Congress, at Washington;" or, at his option, the word "Copyright," together with the year the copyright was entered, and the name of the party by whom it was taken out, thus: "Copyright, 19—, by A. B." But in case of any book which consists either in whole or in part of matter collected, compiled, or selected from previously copyrighted works, the reproduction and publication in such form of the previously copyrighted matter shall not in anywise affect or impair such previous copyrights, though the titles of such previously copyrighted works and the original notices of the copyrights thereof are not reproduced, provided that each separate paragraph, selection, or other portion so reproduced shall cite the original copyrighted work or otherwise clearly identify the same as the source from which such paragraph, selection, or other portion was derived.

Manufacturers of designs for molded decorative articles, titles, plaques, or articles of pottery or metal subject to copyright may put the copyright mark prescribed herein on the back or bottom of such articles, or in such other place on them as it has heretofore been usual for manufacturers of such articles to employ for the placing of manufacturers', merchants', and trade-marks thereon.

SEC. 12. That any person who shall insert or impress the notice of copyright required by this Act, or words of the same purport, in or on any article for which copyright has not been obtained in the United States, or shall cause the same to be done, or shall sell or issue or import from any foreign country any article known to him to contain such false notice of copyright shall be liable to a penalty of one hundred dollars, recoverable one-half for the person who shall sue for such penalty and one-half to the use of the United States.

SEC. 13. That each volume of a book in two or more volumes, when such volumes are published separately, and each number of a periodical shall be considered an independent publication, subject to the form of copyrighting as herein provided.

SEC. 14. That in the case of a book published in a foreign country before publication in this country the deposit in the Copyright Office not later than thirty days after its publication abroad of one complete copy of the foreign edition, with a request for the reservation of the copyright and a statement of the name and nationality of the author and of the copyright proprietor and of the date of publication of the said book, shall secure to the author or proprietor an *ad interim* copyright. Except as otherwise provided, the *ad interim* copyright secured shall have all the force and effect given to copyright by this Act, and shall endure as follows:

(a) In the case of a book printed abroad in a foreign language, for a period of two years after the first publication of the book in the foreign country.

(b) In the case of a book printed abroad in the English language, or in English and one or more foreign languages, for a period of thirty days after such deposit in the Copyright Office.



Whenever within the period of such *ad interim* protection an authorized edition shall be produced and published from type set within the limits of the United States or from plates made therefrom, (a) of a book in the English language or (b) of a book in a foreign language, either in the original language or in an English translation thereof, and whenever the requirements prescribed by this Act as to deposit of copies, registration, and the printing of the copyright notice shall have been duly complied with, the copyright shall be extended to endure in such original book for the full term elsewhere provided in this Act.

SEC. 15. That copyrights and interests therein shall be assignable in law by any instrument in writing, signed by the assignor, and shall be recorded in the Copyright Office within sixty days after its execution; in default of which it shall be void as against any subsequent purchaser, assignee, licensee, or mortgagee without notice, but no such assignment of copyright shall operate to vest in the assignee the rights of dramatization, conversion into nondramatic form, translation, abridgment, adaptation, and rearrangement, unless such assignment in terms grants to the assignee all the rights, title, and interest which the assignor had in and under the copyright so assigned; and such rights of dramatization, conversion into nondramatic form, translation, abridgment, adaptation, and rearrangement may be separately assigned at any time in the manner and form above provided in this section.

SEC. 16. That within three months after publication of any work which has been entered for copyright, the copyright proprietor may file or cause to be filed in the office of the Register of Copyrights an affidavit or affidavits reciting the acts done by the affiant or affiants pursuant to the provisions of this act, for securing copyright, and the day or days on which the said acts were performed, and also the day on which the first copy or copies of the book or other copyrighted thing were sold or distributed or offered for sale or distribution. The Register of Copyrights shall thereupon issue and transmit to the copyright proprietor a certificate, under the seal of his office, that such book or other thing has been duly copyrighted; and such certificate shall thereafter be received in any court of the law or equity as *prima facie* evidence that all the provisions of this act for securing copyrights have been fully complied with.

SEC. 17. That every person who, without the consent of the author or proprietor first obtained, shall publish or reproduce, in any manner whatsoever, any unpublished copyrightable work shall be liable to the author or proprietor for all damages occasioned by such injury, and to an injunction restraining such unauthorized publication, as hereinafter provided.

SEC. 18. That every person who shall have been aggrieved by any violation of any right secured by this act may, at his option, maintain a bill in equity for an injunction, or bring an action at law to recover damages for the violation of such right. In such action at law the plaintiff, in lieu of actual damages, may sue for and recover such damages as to the court shall appear just, to be assessed by the jury at the rate of not less than one dollar for each infringing copy of the copyrighted article, and not less than fifty dollars for each infringing performance of a work in respect to which performance is protected.

SEC. 19. That the courts named in section twenty-one of this act shall have power, on bill in equity, filed by any party aggrieved, to grant injunctions to prevent the violation of any right secured by the laws respecting copyrights, according to the course and principles of courts of equity, on such terms as the court may deem reasonable; and in all actions arising under the laws respecting copyrights the defendant may plead the general issue and give the special matter in evidence. And any injunction that may be granted restraining and enjoining the doing of anything forbidden by this act may be served on the parties against whom such injunction may be granted anywhere in the United States, and shall be operative throughout the United States and be enforceable by proceedings in contempt, or otherwise, by any other court or judge possessing jurisdiction of the defendants.

SEC. 20. That on a bill for an injunction, if the court shall find the defendant guilty of infringement, the plaintiff, except as herein otherwise provided, shall be entitled to a decree requiring the defendant to account for and pay over to the plaintiff all the profits which the defendant shall have made from such infringement. In proving such profits the plaintiff shall be required to show merely that sales have been made, and the defendant shall be required to show the number of copies sold, and also, to prove every element of cost which he claims.

In any suit brought under this Act for an injunction, the court, if it deems that an absolute injunction will be inequitable and not essential to the protection of the complainant's rights, though the defendant has been guilty of infringement, may, nevertheless, retain jurisdiction of the case and render a decree for the payment by the defendant to the plaintiff of such royalties during the life of the copyright infringed and such sum in gross, or either, as may be just, and the court may also grant a permanent injunction to go into effect immediately on any default in the payment of such royalties or sum in gross.

SEC. 21. That all actions arising under the copyright laws of the United States shall be originally cognizable by the circuit courts of the United States, the district court of any Territory, the supreme court of the District of Columbia, the district courts of Alaska, Hawaii, and Porto Rico, and the courts of first instance of the Philippine Islands.

SEC. 22. That actions arising under this Act may be instituted and prosecuted in the district of which the defendant is an inhabitant or wherein is his principal place of business; or in case the work alleged to infringe copyright was intended for local circulation and was prepared and published at such place of circulation, action may be brought in the district in which such place is situated, though the defendant is not an inhabitant thereof and does not have his principal place of business therein.

SEC. 23. That if an action is brought in any place whereof the defendant is not an inhabitant, service of process shall be made by the marshal of the district of which the defendant is an inhabitant, or of the district where he may be found, on receiving a certified copy of the process from the clerk of the court where the suit was brought, and return shall be made by said marshal to said court.

SEC. 24. That the court, on the entry of a final decree of injunction, may therein order that the defendant deliver up, on oath, for destruction, all the infringing copies and all plates, molds, matrices, negatives, and the like, from which such copies were or may be multiplied.

SEC. 25. That the court in which such suit for infringement was brought, or any court having jurisdiction of suits for infringement of copyright, may, after the entry of such final decree, issue a search warrant directed to the marshal or deputy marshal, or any proper person, to search for and seize any such infringing copies, plates, molds, matrices, negatives, and the like, and deliver the same into the custody of the court issuing such search warrant, or to the court in which the suit is pending, which court shall thereupon proceed to hear and determine whether the said articles are subject to destruction under the terms of the said decree.

SEC. 26. That any person who shall infringe the copyright of any work copyrighted under the laws of the United States with knowledge of the copyright and without reasonable grounds for believing that he has a lawful right to publish the infringing work, shall be guilty of a misdemeanor, and on conviction thereof shall be punished by imprisonment not exceeding one year, or by a fine of not less than one hundred dollars, or both, in the discretion of the court, and required to pay the costs of the proceeding.

SEC. 27. That no suit or action, either at law or in equity, shall be maintained for any infringement of copyright unless the same shall be commenced within *six* years after the cause of action has arisen, or the plaintiff or his predecessors in interest had knowledge of such infringement, or of facts sufficient to put him or them on inquiry; nor shall any action be maintained to recover any forfeiture or penalty under the copyright laws unless the same shall be commenced within two years after the cause of action has arisen.

SEC. 28. That the final orders, judgments, or decrees of any court mentioned in section twenty-one of this Act arising under the copyright laws of the United States may be reviewed on appeal or writ of error in the manner and to the extent now provided by law for the review of cases finally determined in said courts, respectively.

SEC. 29. That appliances for automatic reproduction to the ear of music and speech shall not be held infringements of copyright on the musical or other writing reproduced to the ear by such appliance: *Provided, however,* That any person publishing, or making in multiple, for sale, any device or appliance for reproducing to the ear by the aid of any mechanism or automatic musical instrument any copyrighted musical composition or other writing, shall cause to be plainly marked on each such device or appliance and each copy thereof the name of the author of such work and the title by which the same is published, unless

Cases cited—Continued.	Page.
Daly v. Palmer.....	211, 220
Dietz-Harrow case.....	334
Edison Company v. Lubin.....	208
Higgins v. Keuffel.....	216
Holmes v. Hurst.....	216
Kennedy v. McTammany.....	307
Lithograph Company v. Sarony.....	213
Longmans v. Minerva Publishing Company.....	51
McCulloch v. Maryland.....	211
Millar v. Taylor.....	202, 216
National Telephone News Co. v. Western Union Electric Co.....	211
Patterson v. I. S. Ogilvie.....	222
Publishing Company v. Smythe.....	222
Stephens v. Cady.....	222
Stephens v. Gladding.....	222
Werckmeister cases.....	221
White-Smith Publishing Company v. Apollo Company.....	271, 276, 306, 348
Catalogue of copyright entries:	
Provisions of copyright bill (secs. 55-56).....	399
Destruction of manuscript cards.....	122
Use in detecting illegal importations.....	38
Century Company: Statement of R. U. Johnson.....	38
Chaney, John C., House of Representatives Committee on Patents:	
Talking-machine reproductions, etc.....	333
Articles to be inserted in record.....	394
Right of sale.....	159
Infringement of copyright.....	180
Copyright in sculpture.....	275
Chase & Baker Company, correspondence with.....	27
Choralian Company. (See Corolian Company.)	
Church, Melville, present at hearings.....	21
Churchill, Winston, notice of copyright on "Coniston".....	41
Clapp, Moses E., Senate Committee on Patents.....	384
Clark, Melville, Piano Company. (See Burton, Charles S.)	
Clayton v. Stone.....	220
Clemens, Samuel L., statement of.....	116
Cleveland Directory Company, letter indorsing bill.....	389
Columbia Phonograph Company, statements of P. H. Cromelin.....	321
Composers, associations of.....	385, 386
Conditions precedent to bringing suit.....	322
Conferences on copyright.....	26, 31, 154, 345, 396
"Coniston," notice of copyright on English edition.....	41
Connor, W. W., opposed to paragraph g.....	371
Connorized Music Company, on perforated music rolls.....	336
Consolidated Lithograph Company. (See Wilcox, Ansley.)	
Constitutional provision regarding copyright:	
Statement of N. Burkan.....	201
Statement of J. J. O'Connell.....	352
Statement of A. H. Walker.....	272
Statement of R. R. Bowker.....	81
Statement of A. Steuart.....	154
Statement of C. S. Burton.....	257
Statement of J. P. Sousa.....	257
Statement of F. L. Dyer.....	293
Contracts between publishers and authors.....	189
Contracts with musical composers and publishers:	
Æolian Company contracts.....	295, 299, 301, 306, 334, 342, 349, 350, 383, 384
Statement of F. W. Hedgeland.....	26
Statement of J. F. Bowers in re Æolian Company.....	234
Statement of G. W. Furniss in re Æolian Company.....	238
Statement of G. H. Davis.....	268
Copyright, the question of.....	114, 116, 204, 250
Copyright bill, text of.....	5
Tabulated statement of amendments proposed to.....	25
Substitute draft submitted by Melville Clarke Piano Company.....	26, 252, 411
Copyright, constitutional provision regarding. (See Constitutional provision.)	
Copyright cases. (See Cases cited.)	

	Page.
Copyright conferences. ( <i>See</i> Conferences.)	
Copyright Office:	
Administration of .....	398
Correspondence of .....	31, 385
Publications issued by .....	25
Copyright suits. ( <i>See</i> Suits for infringement.)	
Corolian Company .....	341, 342
Cortelyou v. Lowe .....	295
Courier Company. ( <i>See</i> Bleistein v. Donaldson.)	
Courts, jurisdiction of, in copyright cases .....	139, 140, 141, 182
Crawford, D., present at hearings .....	21
Criticisms of copyright bill. ( <i>See</i> Suggestions and criticisms.)	
Cromelin, Paul H., on mechanical devices .....	238, 344, 384
Opposed to sec. 1 (g) of copyright bill .....	25
Musical copyright in England .....	92
Currier, Frank D., House of Representatives Committee on Patents:	
Importation clauses .....	56
Subject-matter of copyright .....	154
Deposit of copies .....	130
Manufacturing clause .....	48, 130, 131, 187
Right of sale .....	90
Copyright suits .....	134, 143
Foreign authors .....	362
Mechanical reproductions of musical compositions .....	231, 276
Notice of copyright .....	125
Royalty for mechanically performed music .....	344, 360
Copyright conferences and hearings .....	28
Curtis, Benjamin, present at hearings .....	21
Cutter, William P.:	
Statement of .....	73, 265, 298
Opposes importation clauses .....	73
Daly v. Palmer .....	211, 220
Daly, Brady v. ....	176
Damages for infringement of copyright .....	36, 49, 99, 142, 149
<i>See also</i> Penalties.	
Davis, G. Howlett .....	268
Dawson, N. E., present at hearings .....	21
Definition:	
Of "publication" .....	100
Of "production," "reproduction," "work," "writing" .....	384
De Kleist Musical Instrument Manufacturing Company .....	382
De Koven, Reginald, represented by W. V. R. Berry .....	197
Statement of .....	197
"O, promise me" .....	357
Deposit of copies, requirement of, in copyright bill .....	130, 99
Destruction of infringing copies or devices .....	37, 123, 139, 180
Devices. ( <i>See</i> Mechanical devices.)	
Dietz-Harrow case .....	334
Directory publishers. ( <i>See</i> Association of American Directory Publishers.)	
Donaldson, Bleistein v. ....	141
Dougherty, J. W., present at hearings .....	21
Dramatic composition:	
Unlawful representation of .....	149, 181, 183
Penalties for unlawful representation, sec. 4966 R. S. ....	35
<i>See also</i> Performance, right of.	
Dramatic musical compositions .....	172
Dramatists' Club .....	183
Dramatization, right of:	
Ten years' reservation .....	95
Droop, E. F., & Sons Company, letter of .....	332
Duration of copyright:	
Provisions of copyright bill (sec. 18).	
Extension of term, advocated .....	81, 95, 114, 165, 167, 191
Extension of term, opposed .....	36, 137, 140
Extension of existing copyrights .....	95, 353
In mechanical reproductions .....	308, 354
Should be coexistent with patent right .....	36, 357

Duration of copyright—Continued.	Page.
In works by joint authors (sec. 18).	
Ad interim term (sec. 16).	
Limitation of ten years for dramatization and translation.....	95
Foreign countries, provisions in .....	401
Duval, L. M., present at hearings.....	21
Dyer, F. L., statement of .....	286
Edison Company v. Lubin .....	218
Edison Phonograph Works, represented by F. L. Dyer.....	286
Edwards, Gus, Music Publishing Company.....	327
Emanon Music Publishing Company.....	331
Engel, S. Clarence, letter of .....	329
England, copyright in .....	42, 114, 116, 167, 202
Musical copyright in .....	269, 344
Text of musical copyright act, 1906.....	92
Extension of existing copyrights .....	95, 173, 353
Failure to comply with formalities within one year .....	166
Falk, B. J., present at hearings .....	22, 389
False affidavit, penalty for .....	35, 130
Farrand Organ Company.....	335
Feeney, J. L., present at hearings.....	22
Fees, for registration—	
Provisions of copyright bill (sec. 60).	
Statement of H. Putnam.....	398
Feist, Leo .....	22, 314, 324
Fine arts, works of the:	
Copyright in.....	168
Notice of copyright on.....	97, 99
Publication of.....	101
Reproductions of.....	100
Fonopio Company.....	348
Foreign author:	
Notice of copyright on works by .....	38
Of musical composition .....	342
Simultaneous American publication by .....	165
Foreign edition, importation of.....	53, 190
(See also Importation.)	
Formalities. (See How to secure copyright.)	
Foster, David J., House of Representatives, present at hearings .....	21
France, infringement of musical composition by mechanical devices ...	287, 337, 338
Freund, H. E., present at hearings .....	22
Fromme, Herman, letter from .....	170
Fuller, Paul, statement of.....	398
Furniss, George W., statement on behalf of Music Publishers' Association....	238
Germany, mechanical reproduction of copyrighted works .....	314,
320, 341, 342, 346, 347, 354	
Gill, John, jr., House of Representatives Committee on Patents:	
Gladding, Stephens v.....	222
Glockling, R., statement of.....	261
Government publications, no copyright in.....	133
Gray, H. W., present at hearings.....	22
Grimm, E. G., present at hearings.....	22
Hale, Edward Everett:	
Copyright in "Man Without a Country" .....	87
Statement of .....	114
Hamilton, C. P., present at hearings.....	22
Harper & Brothers, affidavit as to Blackwood's Magazine .....	44
Harrington, David C., statement of .....	151
Harris Music Publishing Company .....	328
Hedgeland, Frederick W., statement of.....	26
Helf & Hager Company.....	327
Herbert, Victor:	
Present at hearings .....	21
Quoted .....	233, 335
Heyl, Jacob, present at hearings .....	22
Higgins v. Keuffel.....	216

	Page.
Hinshaw, Edmund H., House of Representatives Committee on Patents:	
Right of sale .....	164
Mechanical reproductions .....	207, 233, 296
Hollis, W. H., present at hearings .....	22
Holmes <i>v.</i> Hurst .....	209, 216
Horgan, S. H., on newspaper illustrations .....	172
How to secure copyright:	
Provisions of copyright bill criticised .....	135
Amendments suggested by H. N. Low .....	114
Foreign countries not requiring formalities .....	99
Howard, Bronson, on infringement of dramatic compositions .....	149
Howells, W. D., present at hearings .....	22
Hughes, Charles E., counsel for <i>Æolian Company</i> .....	276
Hurst, Holmes <i>v.</i> .....	209, 218
Importation:	
Provisions of copyright bill (sec. 30).	
Statement of George Haven Putnam .....	49, 190
Statement of J. J. Sullivan, on importation of books from Japan .....	184
Statement of A. Steuart .....	174
Statement of A. E. Bostwick, of Amer. Library Association .....	58
Statement of B. C. Steiner .....	61
Statement of H. C. Wellman .....	68
Statement of R. U. Johnson .....	94
Statement of C. P. Montgomery, of the Treasury Department .....	127
Statement of G. W. Ogilvie .....	38
Statement of W. P. Cutter .....	73
Of unlawful copies of musical compositions .....	239
Infringement of copyright .....	128
Provisions of copyright bill relating to (secs. 21-36).	
Seizure of unlawful copies in case of .....	142, 239
<i>See also</i> Cases cited; Suits for infringement; Penalties.	
Injunction in case of infringement .....	182
Inland Printer, extract from .....	172
Innes, Fred N., represented by H. Fromme .....	170
Interim copyright, term of (sec. 16).	
International Brotherhood of Bookbinders:	
Statement of R. Glockling, with amendment proposed .....	261
International copyright. ( <i>See</i> Foreign authors.)	
International Correspondence Schools .....	151
International Text-book Company .....	151
International Typographical Union:	
Amendments proposed by .....	188
Statement of J. J. Sullivan .....	129, 185, 166
Interpretation of copyright law as affected by new bill .....	139
Inventors, effect of copyright bill on:	
Statement of G. H. Davis .....	269
Statement of A. H. Walker .....	285
Italy, mechanical reproduction of music .....	348
Jack, Annie, letter of .....	332
Jackson, Geo. J., present at hearings .....	22
Japan, books imported from .....	46
Johnson, R. U.:	
Statement of .....	88
Mechanical reproduction of music .....	38, 41, 230, 165, 236
Royalties .....	265
Johnston's History of Library of Congress, quoted .....	275
Joint authors, duration of copyright in works by (sec. 18).	
Jordan, Jules, letter of .....	374
Judicial decisions not subject-matter of copyright .....	133
Jurisdiction of courts in copyright cases .....	139, 141, 179, 180
Kaufman, S. L. ....	22
Kehr, Cyrus, correspondence with .....	390
Kennedy <i>v.</i> McTammany .....	307
Keuffel, Higgins <i>v.</i> .....	216
Kimball Company .....	371
Kirk, Hyland C. ....	22

	Page.
Kittredge, Alfred B., chairman, Senate Committee on Patents:	
Mechanical devices .....	289, 334
Royalty system .....	91
Jurisdiction of courts in copyright cases .....	181
Kleist, Eugene de. ( <i>See De Kleist Musical Instrument Manufacturing Co.</i> )	
Krell, Albert, on perforated rolls .....	335
Kremer, Victor, Company .....	328
Labels and prints for articles of manufacture .....	360
Latimer, Asbury C., Senate Committee on Patents:	
Republication of foreign books .....	44
Lecture:	
Copyright in unpublished .....	157, 161, 163
Oral, omitted from substitute draft of C. S. Burton .....	37
Leeds and Cattlin Co .....	391
Legare, George S., House of Representatives Committee on Patents:	
Renewal of copyright .....	364
Right of sale .....	322
Lewandowski, D. P., letter of .....	159, 160
Librarian of Congress. ( <i>See Putnam, Herbert.</i> )	
Libraries, importation for .....	76, 79, 93, 193
Limitation of actions .....	100, 103
List of persons present at hearings .....	21
"Lithograph":	
Exception in manufacturing clause .....	194
Lithograph (Consolidated) Company in favor of copyright bill .....	141
Lithograph Company v. Sarony .....	203, 204, 206, 213, 215, 220
Littlefield, Chas. E., House of Representatives, present at hearings .....	21
Livingstone, William A., statement of .....	98
Longmans v. Minerva Publishing Co. ....	51
Loud, Geo. A., House of Representatives, present at hearings .....	21
"Lovey Mary," omission of copyright notice from .....	38
Low, H. N.:	
Mechanical musical instruments .....	113
Amendments proposed by .....	114
Destruction of card indexes .....	399
Lowe, Cortelyou v. ....	295
Lubin, Edison Company v. ....	148
Lyon & Healy .....	368
Macaulay, Lord, on term of copyright .....	119
McCulloch v. Maryland .....	211, 221
MacDonald, Pirie, present at hearings .....	22, 389
McElhone, Philip, present at hearings .....	22
McGavin, Charles, House of Representatives Committee on Patents:	
Reproduction of music by mechanical devices .....	282, 312
McKinney, William M., statement of .....	138
Secondhand book trade .....	164
McTammany, Kennedy v. ....	307
Magazine, notice of copyright on .....	44
Mails, importation through the .....	126
"Making," meaning of, in sec. 8. ....	165
Malcomson, A. Bell, present at hearings .....	22
Mallory, Stephen R., Senate Committee on Patents:	
Importation clauses .....	93, 125
Judicial opinions .....	134
Seizure of infringing copies .....	143
Manufacture, prints and labels for articles of .....	364
Manufacturing clause:	
Provisions of copyright bill (sec. 13).	
Statements of J. J. Sullivan .....	46, 184, 166, 262
Objected to by American Association of Directory Publishers .....	150
Statement of A. Steuart .....	166
Amendment proposed by International Brotherhood of Bookbinders .....	261
Photographs omitted from .....	100
Affidavit required under .....	35, 130
Books printed abroad from plates made in United States .....	43

	Page.
Manufacturing clause—Continued.	
Statement of G. H. Putnam.....	192, 194
Statement of C. Porterfield.....	130
Manuscript:	
Filing of unpublished, omitted from substitute draft of C. S. Burton.....	57
<i>See also</i> Unpublished works.	
Manuscript Society, invited to conference on copyright.....	385
Marshall, Justice, cited.....	211, 221
Material object, transfer of, distinct from copyright (sec. 37).	
Mauro, Philip:	
Present at hearings.....	22
Memorandum of objections.....	376
Mechanical devices for reproducing sound:	
Statement of G. H. Davis.....	268
Statement of F. W. Hedgeland.....	26
Statement of Reginald De Koven, in favoring sec. 1 (g).....	197
Statement of Horace Pettit.....	201
Statement of R. R. Bowker.....	201
Statement of Nathan Burkan.....	204
Statement of J. L. Tindale.....	227
Statement of B. F. Wood.....	236
Statement of G. W. Furniss.....	238
Statement of C. S. Burton.....	252
Statement of G. W. Pound.....	298
Statement of E. De Kleist.....	382
Amendment proposed by American Musical Copyright League.....	384
Reading of productions on.....	156, 257, 286
Term of copyright in, should be coexistent with patent right.....	36, 357
<i>See also</i> Perforated music roll; Talking-machines.	
Merriam, G. and C., Company, copyright in Webster's dictionary.....	48
Millar v. Taylor.....	202, 216, 219, 221, 274
Miller, Arthur H., letter of.....	310
Miller, Joaquin, present at hearings.....	22
Millet, Frank D., statement of.....	97
Moffett, Saml. E., present at hearings.....	22
Montgomery, Charles P., decisions of Treasury Department.....	46, 47
On importation clauses.....	127
Communications from.....	391
Morgan, Paul B., letter of.....	373
Murphy, James J., present at hearings.....	22
Music Publishers' Association of the United States:	
Statement of J. F. Bowers.....	234, 305
Contracts of, statement of F. L. Dyer.....	295
Statement of P. H. Cromelin.....	321
Statement relating to, by A. H. Walker.....	277
Statement of George W. Furniss.....	238
Statement of N. Burkan.....	201
Statement relating to, by F. W. Hedgeland.....	26, 29
Statement of A. Steuart.....	158
Statement of J. L. Tindale.....	300, 227, 329
Music Trades, The, article in.....	242, 247, 336
Musical Age.....	283, 346, 350
Musical composition:	
"Arrangement" of.....	170
Duration of copyright in (sec. 18).....	
Notice of right of performance on.....	162
Right of performance of.....	162, 170, 171
Penalties for unlawful performance of, Sec. 4966, Rev. Stat.....	375
Importation of infringing copies.....	239
Mechanical reproduction of—	
Statements of J. P. Sousa.....	233, 254, 311
Statement of F. W. Hedgeland.....	26
Statement of R. R. Bowker.....	247
Statement of A. H. Walker.....	270
<i>See also</i> Perforated music roll; Talking machines; Mechanical devices.	
Reading of mechanical arrangements of.....	157, 204, 272, 286
Copyright of, in England.....	202, 268, 344



	Page.
Musical copyright act of England, text of.....	92
Musical Copyright League .....	32, 384, 386
Musical Courier.....	385
National Academy of Design, statement of F. D. Millet.....	97
National Telephone News Co. v. Western Union Electric Co.....	211, 220
Nature and extent of copyright:	
Provisions of bill (secs. 1-3).....	
Statement of R. R. Bowker.....	77, 250
Statement of C. Porterfield.....	131
Statement of A. Wilcox.....	172
Statement of A. Steuart.....	158
Statement of G. H. Putnam.....	189
<i>See also</i> Performance; Mechanical devices.	
New York Bar Association. ( <i>See</i> Association of the Bar of the City of New York.)	
Newspaper illustrations.....	169, 170, 172
Newspapers. ( <i>See</i> American Newspaper Publishers' Association.)	
Notice of copyright:	
Provisions of copyright bill relating to, effect of.....	139
On periodicals and composite works .....	152
On works of art (sec. 14).....	
Should include date of entry .....	135
Omission of, from particular copies (sec. 15).....	
Penalty for false (sec. 25).....	
Penalty for removal of (sec. 25).....	
Noyes, Theodore W.:	
Present at hearings .....	23
Copyright in photographs.....	169
O'Connell, John J.:	
Automatic piano players.....	236, 352
Penalties .....	316, 318
Copyright suits .....	178
O'Connor, T. P., musical copyright act, text of.....	92, 347, 361
Ogilvie, George W.:	
Statement of .....	38
Notice of copyright.....	38
Importation .....	43
Ogilvie, I. S., Patterson v. ....	222
Oral works:	
Copyright in.....	157, 161
Omitted from substitute draft of C. S. Burton .....	37
Page, Thomas Nelson:	
Statement of .....	96
Importation for libraries.....	193
"Painting," notice of copyright on .....	97
Palmer, Daly v. ....	211, 220
Patent rights:	
Statement of N. Burkan.....	295
Term of protection in devices for reproducing music .....	36
Statement of F. L. Dyer.....	293
Constitutional provision regarding.....	289
Patents, Commissioner of. ( <i>See</i> Allen, F. I.)	
Pathé Frères .....	346
Patterson v. I. S. Ogilvie .....	222
Penalties:	
For infringement of copyright .....	49, 128, 139, 142, 148, 316, 317
By automatic mechanical devices .....	36
Of photographs .....	169, 172
Of paintings.....	101
Destruction of infringing copies or devices .....	37, 142-172-181
For failure to comply with formalities, not included in bill.....	165
For false affidavit as to place of manufacture.....	35, 130
For false notice of copyright (sec. 25).....	
For removal of notice of copyright (sec. 25).....	
Section 4966, Revised Statutes.....	176, 371

	Page.
Perforated music roll:	
Statement of G. H. Davis.....	268
Statement of J. J. O'Connell.....	352
Statement of H. N. Low.....	113
Statement of A. H. Walker.....	270
Statement of C. S. Burton.....	34
Statement of N. Burkan.....	320, 345, 362
Statement of A. Steuart.....	154
Statement of P. H. Cromelin.....	321
<i>See also</i> Mechanical devices.	
Performance:	
Right of.....	161, 170, 171, 273, 296, 373
Notice of reservation of right of, on musical compositions.....	164
Section 4966, Revised Statutes.....	176, 371
Periodical, notice of copyright on.....	95
Periodical contributions:	
Notice of copyright on.....	45, 151
Perkins, James B., House of Representatives, present at hearings.....	21
Pettit, Horace, on mechanical devices.....	200, 342
Foreign editions.....	193
Right of sale, etc.....	163, 164
Phonograph. ( <i>See</i> Talking machines.)	
Phonola Company.....	341
Photograph:	
Copyright in.....	203
Penalties for infringement of.....	169, 170, 172
Fee for registration of (sec. 60). . .	
Notice of copyright on (sec. 14). . .	
Omitted from manufacturing clause.....	100, 194
Photographers Copyright League.....	388
Piano players, automatic. ( <i>See</i> Perforated music roll.)	
Polk, R. L., & Co., directory publishers.....	150
Porterfield, C., statement of.....	126
Criticism of arguments of, by R. R. Bowker.....	78, 80
Right of sale.....	161
Substitute bill of.....	427
Posters.....	141
<i>See also</i> Lithographs.	
Pound, G. W., statement of.....	298, 306
Price of books, control of.....	73, 74, 75
Prince, Charles A., communication of.....	333
Print Publishers' Association of America:	
Invited to conference on copyright.....	5
Statement of W. A. Livingstone.....	98
Memorandum to Committees of Patents.....	103
Protection of copyright.....	143
Publication of work of art.....	101
Publisher, rights of:	
In extension of existing copyrights.....	48
In case of assignment of copyright.....	189
Publishers' Association of New York City.....	169
Publishers' Copyright League. ( <i>See</i> American Publishers' Copyright League.)	
Publishing Company v. Smythe.....	222
Putnam, George Haven, statements of.....	27, 49, 188
Putnam, Herbert, Librarian of Congress:	
Conferences and hearings on copyright.....	31, 32, 349, 385
Duration of copyright.....	398
Copyright fees.....	398
Copyright deposits.....	398
Copyright office, administration of.....	398
Correspondence relating to copyright bill.....	31, 385
History of copyright bill.....	396
Publications issued by copyright office.....	25
Q. R. S. Company. ( <i>See</i> Burton, Charles S.)	
Ray, R. R.....	23
Reading of mechanical arrangements of music.....	156, 271, 286
Recoveries in copyright suits. ( <i>See</i> Penalties.)	

	Page.
Register of copyrights. ( <i>See</i> Solberg, Thorvald.)	
Registration:	
Provisions in copyright bill (sec. 10).	
Criticism of provision in copyright bill .....	135
Failure of, within one year (sec. 15).	
Fees for (sec. 60).	
Remedies for infringement.....	143, 150, 174
<i>See also</i> Infringement.	
Remick, Jerome H., Company .....	325, 326
Renewal of copyright:	
Of existing copyright works.....	48
Repealing clause, section 64.....	128
Replevin, as remedy for infringement.....	146
Representation. ( <i>See</i> Performance.)	
Reproduction of music, etc., by mechanical devices. ( <i>See</i> Mechanical devices.)	
Reproduction of work of art .....	99, 103
Reservation of copyright. ( <i>See</i> Interim copyright.)	
Revised Statutes, section 4966.....	176, 181
Ricordi & Co., of Milan, Italy.....	348, 361
Rodesch, R. A .....	23
Roth & Engelhardt, letter of.....	325
Royalty:	
For reproduction of music .....	37, 248, 255, 265, 266, 344, 345
Statement of R. R. Bowker .....	79
Statement by R. U. Johnson .....	264
Statement of G. H. Putnam.....	192
Statement of C. S. Burton.....	255-264
Statement of J. J. O'Connell.....	357
Statement of G. W. Pound.....	318
Sale, right of.....	90, 131, 147, 158, 161, 190, 295
Sanborn, Judge, decision on copyright case.....	45
Sargent, S. H .....	392
Sarony, Lithograph Co. v.....	205, 206, 208, 213, 233
Schirmer, G.....	373
Schleiffarth, George, testimony of.....	259
Schlotterbeck, G., present at hearings.....	23
Schutters, H. J., present at hearings.....	23
Scott, Frank H., notice of copyright.....	38
Scott, Dr. G. W., present at hearings.....	23
Sculpture, copyright in.....	74-245
Series, fee for registration of (sec. 60).	
Sermon. ( <i>See</i> Lecture.)	
Serven, A. R., proposed amendment regarding talking machines .....	366
Sherman antitrust law .....	334
Silverware, copyright in designs for.....	168
"Simple life," publication of translation of.....	49
Smoot, Reed, Senate Committee on Patents:	
Duration of copyright.....	360
Importation clauses.....	76
Infringement of copyright.....	175
Mechanical reproductions.....	207, 291, 319
Smythe, Publishing Co. v.....	222
Solberg, Thorvald, Register of Copyrights:	
Associations of composers in United States .....	385, 386
Notices of hearing on copyright bill.....	385
Sound records. ( <i>See</i> Talking machines.)	
Sousa, John Philip:	
On mechanical reproduction of music .....	228, 233, 254, 311
Compositions of, on talking-machine records, statement of P. Cromelin..	330
Suits for infringement.....	183
Duration of copyright.....	201
Royalty system .....	95, 246, 266, 312
Speech. ( <i>See</i> Lecture.)	
Spencer, Herbert, on copyright.....	248
Steiner, Bernard C., opposes importation clauses in copyright bill.....	61
Stephens v. Cady .....	222

	Page.
Stephens v. Gladding .....	222
Stern, Jos. W., & Co., letters of .....	322, 324
Steuart, A.	
Statements of .....	154, 173
Amendment proposed by .....	161, 354
Communication to Librarian of Congress .....	397
Stone, Clayton v. ....	220
Strauss, Bobbs-Merrill v. ....	74, 296
Subject-matter of copyright:	
Constitutional provision .....	79
Criticisms of provisions of bill .....	132
Lithographic prints, engravings, posters, etc. ....	102, 206
"Works of an author" (sec. 4) .....	157
"Reproductions of a work of art" .....	101, 105, 254
Oral lectures, dramatic compositions, etc. ....	157, 161
"Books" (sec. 5) .....	162
Perforated music rolls .....	206
<i>See also</i> Mechanical devices.	
Suggestions and criticisms:	
Section 1 (b)—	
Hon. F. D. Currier .....	90
E. De Kleist .....	383
H. N. Low .....	113
H. C. Wellman .....	68
Section 1 (f)—	
R. R. Bowker .....	250
S. H. Sargent .....	392
A. Steuart .....	250
Section 1 (g)—	
R. R. Bowker .....	250
P. H. Cromelin .....	340
E. De Kleist .....	383
F. W. Hedgeland .....	29
J. J. O'Connell .....	352, 371
S. H. Sargent .....	392
A. Steuart .....	161
B. F. Wood .....	237
Section 3—	
C. S. Burton .....	253
W. A. Livingstone .....	99
Section 5, W. A. Livingstone .....	99
Section 6, J. J. O'Connell .....	364
Section 8 (b)—	
P. H. Cromelin .....	344
J. J. O'Connell .....	360
Section 13—	
R. Glockling .....	261
W. A. Livingstone .....	100
Section 14—	
W. A. Livingstone .....	99
H. C. Wellman .....	68-73
Section 15, G. W. Ogilvie .....	38-40
Section 18—	
S. L. Clemens .....	116
E. E. Hale .....	114
J. J. O'Connell .....	365
Section 18 (b), A. H. Walker .....	309
Section 18 (c), H. C. Wellman .....	68-73
Section 19, G. W. Ogilvie .....	48
Section 20, R. U. Johnson .....	88
Section 21, G. W. Ogilvie .....	48
Section 23, W. A. Livingstone .....	101
Section 30—	
A. E. Bostwick .....	58
G. H. Putnam .....	49
B. C. Steiner .....	61
H. C. Wellman .....	68-73

<b>Suggestions and criticisms—Continued.</b>	<b>Page.</b>
Section 30 (e), Hon. S. R. Mallory .....	93
Section 34, W. A. Livingstone.....	103
Section 39, C. S. Burton .....	255
<i>See also</i> Amendments proposed.	
<b>Suits for infringement of copyright:</b>	
Provisions of copyright bill (secs. 23-24, 32-36).....	139, 152, 181, 316
Jurisdiction of courts in.....	149, 317
Venue of action (sec. 32, par. 2) .....	181
Injunction in case of infringement.....	99, 103
Limitation of actions.....	138
Pending, should not be affected by new act.....	
<i>See also</i> Cases cited.	
Sullivan, J. J., on manufacturing clause.....	46, 129, 166
Summy, Clayton F., Company, contract with Æolian Company .....	184, 261
Supreme Court reports, copyright in.....	134
<b>Talking machines:</b>	
Statement of R. R. Bowker .....	77
Statement of Frank L. Dyer .....	286
Statement of J. P. Sousa .....	228, 233
Statement of V. Herbert, quoted .....	234
Statements of H. Pettit .....	200
Statement of P. Fuller .....	200
Statement of P. H. Cromelin .....	321
<i>See also</i> Mechanical devices.	
Tams, Arthur W .....	371
Tauchnitz editions .....	57
Taylor, Millar v.....	202, 216, 219
Teleelectric Company, telegram to P. H. Cromelin .....	395
Telegraphonic record .....	210, 376
<i>See also</i> Mechanical devices.	
Teleharmonic dynamophone .....	78, 210, 249
Term of copyright. ( <i>See</i> Duration of copyright.) .....	
Text of copyright bill .....	5
Thomæ, R. L .....	342
Thompson, Edward, Company. ( <i>See</i> Porterfield, C.; and McKinney, W. M.) .....	
Thurber Music Publishing Company .....	328
Tilton, G. P., statement of .....	168
Tilzer, H. von. ( <i>See</i> Von Tilzer, H.) .....	
Tindale, J. L .....	227, 329, 300, 375
Title, publication of book under different .....	44
Towle Manufacturing Company, statement of G. P. Tilton.....	168
Trade-mark cases .....	216
Trade-mark law, remedies provided by .....	174, 175, 178
<b>Transfer of copyright:</b>	
Distinct from transfer of material object (sec. 37).....	
<i>See also</i> Assignment of copyright.	
Translation, right of .....	95
Treasury Department decisions.....	46, 167
Detection of illegal importations.....	47
<i>See also</i> Montgomery, C. P.	
Treloar bill .....	234
Trow Directory Publishing Company, notation by Mr. Bates of .....	149
Typesetting within the United States. ( <i>See</i> Manufacturing clause.) .....	
Typographical Union. ( <i>See</i> International Typographical Union.) .....	
Unauthorized copies, importation of. ( <i>See</i> Importation.) .....	
Underwood & Underwood .....	393
United States copyright laws, history of .....	204
<b>Unpublished works:</b>	
Copyright in .....	161, 163
Filing of manuscripts for .....	37
Vandersloot Music Publishing Company .....	327
<b>Victor Talking Machine Company:</b>	
Represented by R. L. Thomæ at June hearings.....	342
Statements of H. Pettit .....	343
Statement of J. F. Bowers .....	234
Statement of P. Cromelin .....	342

	Page.
Von Tilzer, Harry, letter of .....	310
Walker, Albert H.:	
Statement of .....	270
Nature of copyright .....	271
Copyright suits .....	183
Mechanical devices .....	309, 334
Duration of copyright .....	309
Infringement and penalties .....	183
Jurisdiction of courts .....	150-151
Amendment proposed by .....	140
Question as to notice of reservation .....	164
Constitutional provision in regard to patents .....	289
Webb, Edwin Y., House of Representatives Committee on Patents:	
Notice of copyright .....	52
Mechanical devices .....	207
Contracts between publishers and authors .....	356
Webster's brief international dictionary, omission of copyright notice from. ....	39
Webster's dictionary, copyright in .....	48
Wellman, H. C., statement of .....	68
Protection of dramatic composers .....	181
Werckmeister cases .....	221
Western Union Electric Company, National Telephone News Company v. ....	211
White-Smith Publishing Company:	
Suit against Apollo Company .....	271, 276, 306, 348
Letters to .....	27
Who may obtain copyright:	
Provisions of bill (sec. 8) .....	164
Suggestion as to foreign authors .....	344
Wilcox, Ansley, statements of .....	141, 176, 177, 196
Williams, Otis E., Music Publishing Company .....	329
Winter, J., on piano players .....	336
Witmark, Jay .....	23
Wood, B. F., statement of .....	236
Wooster, Frank, Company .....	331
Works of Art. (See Fine arts.)	
"Writing:"	
Proposed to include mechanical devices .....	271
See also Constitutional provision regarding copyright.	
Wurlitzer, H. E., present at hearings .....	23
Wurlitzer, R., Company .....	298
Zimmerman, J. S. M. ....	312

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